136

65867

S. B.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 183

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD, ETC., ET AL., APPELLANTS,

vs.

LAFAYETTE A. JACKSON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA

FILED JUNE 4, 1930

(35,105)

(35,105)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 183

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD, ETC., ET AL., APPELLANTS,

vs.

LAFAYETTE A. JACKSON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA

INDEX

	Original	Print
Record from district court of the United States, Southern Indiana	1	1
Caption.....(omitted in printing)..	1	
Bill of complaint	2	1
Subpœna in equity and service..(omitted in printing)..	24	
Motion to dismiss bill of complaint	26	17
Brief in support of motion to dismiss	29	19
Order overruling defendants' motion to dismiss bill of complaint	45	32
Temporary injunction	46	32
Answer	51	35
Opinion, Baltzell, J.	71	51
Final decree	85	65
Notice and proof of service of notice of lodgment of narrative of evidence	89	67
Petition for appeal, assignment of errors, and prayer for reversal	92	68

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 5, 1930

	Original	Print
Order granting appeal	96	70
Appeal bond (omitted in printing)	97	
Citation and service (omitted in printing)	105	
Statement of evidence	108	71
Testimony of Robert W. Lyons	109	71
Exhibits "A-1" and "A-2"—Statements showing unit sales of various companies, unit profits, etc.	119	79
Testimony of P. H. Nystrom	145	98
Exhibit "B"—Statement showing estimated distribution of retail trade by general merchandise line in 1927	147	100
Testimony of S. B. Walker	163	115
Victor C. Kendall	163	116
Lawrence Carter	164	116
Exhibit "C"—Statement of per cent ratio to 1922, for stores, sales, and profits	165	117
Testimony of Chester H. Jackson	168	119
Lawrence Carter (recalled)	168	120
William A. Rawls	168	120
Albert H. Gisler	183	131
Exhibit 1—Statement re S. S. Kresge Company	193	138
Order approving statement of evidence	194	139
Præcipe for transcript of record	196	139
Clerk's certificate (omitted in printing)	199	
Statement of points to be relied upon and designation to print entire record	200	140

[fols. a & 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

In Equity. No. —

LAFAYETTE A. JACKSON, Plaintiff,

v.

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF Indiana; William A. Hough, Pliny H. Wolford, and Philip Zoercher, as Members of State Board of Tax Commissioners of the State of Indiana; James M. Ogden, Attorney General of the State of Indiana, Defendants

BILL OF COMPLAINT—Filed April 19, 1929

To the Honorable Judge of the District Court of the United States for the Southern District of Indiana:

Lafayette A. Jackson, doing business as "Standard Grocery Company," a citizen and resident of Marion County in the State of Indiana, brings this his bill of complaint against State Board of Tax Commissioners of the State of Indiana, William A. Hough, Pliny H. Wolford and Philip Zoercher as members of said State Board of Tax Commissioners, and James M. Ogden as Attorney General of the State of Indiana, and each of them; all of said defendants being citizens and residents of the State of Indiana and of the Southern District in said State, and thereupon complains and says:

[fol. 3] 1. That the plaintiff is now and has been for more than thirty years continuously last past a citizen of the State of Indiana and a resident of the City of Indianapolis, Marion County, State of Indiana.

2. That the defendants, William A. Hough, Pliny H. Wolford and Philip Zoercher are the duly and legally appointed, qualified and acting members of said defendant, State Board of Tax Commissioners of the State of Indiana, which is a Commission created pursuant to an act of the General Assembly of the State of Indiana and which Commission has been in existence, in pursuance of law, for more than twenty years continuously last past; that said individual defendants last named are the only members of said state Board of Tax Commissioners; that under and by virtue of the terms of Enrolled House Bill 197 of the Acts of the Indiana General Assembly of the State of Indiana for the year of 1929 the defendant, the State Board of Tax Commissioners of the State of Indiana is charged with the duty of preparing blank forms of application to be made out by persons desiring to be licensed under said Act, with the issuance of licenses thereunder, with the collection of license fees from such applicants and then payment of the same monthly into the State Treasury, is authorized to employ clerical assistants to carry out the terms of said Act and is generally charged with the administration of said law; that James M. Ogden, one of the defendants hereto, is the duly elected, qualified and acting Attorney General of the State of Indiana and as such is charged by law with the duty of enforcing the valid statutes of the State of Indiana.

[fol. 4] 3. That the amount in controversy in this cause exceeds the sum or value of Three Thousand Dollars ($3,000), exclusive of interest and costs.

4. That this suit is of a civil nature in equity and is brought for the purpose of enjoining the enforcement of an act of the General Assembly of the State of Indiana entitled: "An Act requiring licenses for the operation, maintenance, opening or establishing of stores in this State, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the State Board of Tax Commissioners in connection therewith, and prescribing penalties for the violation thereof," which said Act was known as Enrolled House Bill No. 197 and also as Chapter 207 of the Acts of the Indiana General Assembly for the Year 1929.

5. Plaintiff further alleges that for more than ten years continuously last past plaintiff has been and is now engaged in the business of selling groceries, fresh vegetables and meats at wholesale and retail in the City of Indianapolis, Indiana, and during all of said time has conducted and now conducts said business in the name of "Standard Grocery Company," although said business and the property used therein is owned by the plaintiff as an individual; that in the course of such business, plaintiff is engaged in interstate commerce, in that a substantial portion of the merchandise used by him is bought in other states and shipped to plaintiff into the State of Indiana.

That the plaintiff at the date of the enactment of said statute was the owner and is now the owner of two hundred [fol. 5] and twenty-five (225) stores in the City of Indianapolis, all of which are operated and maintained by plaintiff at separate locations in said City of Indianapolis, but under one management controlled, superintended and financed as an individual business of plaintiff.

That plaintiff has now and has had for more than ten years continuously last past a sum in excess of $200,000.00 invested in his said business and that during all of said time his annual sales have exceeded the sum of $1,000,000.00.

That there are a large number of individual copartnerships and corporations engaged in business in the State of Indiana which own and operate one mercantile establishment in this state carrying on a business similar to that carried on by the plaintiff and doing a very much larger volume of business than is done in any one of plaintiff's stores and doing as much business in one store as plaintiff does in all of his stores put together; that plaintiff in his stores carries on business in every way exactly as business is carried on in stores which are separately owned by one individual, co-partnership or corporation; that he deals in the same articles and sells to the same public and that plaintiff's business is distinguishable from that of a person, co-partnership or corporation operating only one store in no way whatsoever except that in plaintiff's case the plaintiff owns more than one store while in the case of the others the owner owns and operates but one store; that the ownership by one person of more than one store does not

increase the fire hazard, injure the health and morals of the community or require increased or additional police protection except in an arithmetical ratio.

[fol. 6] 6. That there are more than five-hundred persons, firms, corporations, associations and co-partnerships, foreign and domestic, lawfully engaged in the operation of two or more stores for the sale of meats, groceries, vegetables, hardware, clothes, oil or other articles of merchandise in the State of Indiana who are in a like situation with plaintiff; that the owners of said stores are too numerous to join in this action and that the plaintiff prosecutes this case on his own behalf and on behalf of all other individuals, firms, associations, co-partnerships and corporations who are at this time engaged in the operation of two or more stores in the State of Indiana and for the purpose of enjoining the enforcement of said statute of the General Assembly of the State of Indiana against plaintiff and all such other individuals, firms, associations, co-partnerships and corporations owning or operating two or more stores in said State; that the question of the invalidity of said statute is one of common and general interest to all of said class of persons within the meaning of Equity Rule No. 38.

7. Plaintiff alleges that the General Assembly of the State of Indiana for the year 1929 passed an Act known as Enrolled House Bill No. 197 (Chapter 207 of the Acts of the General Assembly for the year 1929) which Act was passed by said General Assembly of the State of Indiana on Monday, March 11th, 1929, and which Act was approved and signed by the Governor on March 16th, 1929; that said Act was and is in the words and figures following, towit:

[fol. 7] "Enrolled Act No. 197, House

An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state board of tax commissioners in connection therewith, and prescribing penalties for the violation thereof

Section 1. Be It Enacted by the General Assembly of the State of Indiana, that from and after the first day of July,

1929, it shall be unlawful for any person, firm, corporation, association or co-partnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained a license so to do from the state board of tax commissioners, as hereinafter provided.

Section 2. Any person, firm, corporation, association or co-partnership desiring to operate, maintain, open or establish a store in this state shall apply to the state board of tax commissioners for a license so to do. The application for a license shall be made on a form which shall be prescribed and furnished by the state board of tax commissioners, and shall set forth the name of the owner, manager, trustee, lessee, receiver or other person desiring such license; the name of such store; the location, including the street number, of each store; and such other facts as the state board of tax commissioners may require. If the applicant desires to operate, maintain, open or establish more than one such store, he shall make a separate application for a license to operate, maintain, open or establish each such store, but the respective stores for which the applicant desires to secure licenses may all be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this Act.

Section 3. As soon as practicable after the receipt of [fol. 8] any such application, the state board of tax commissioners shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If, upon examination, the state board of tax commissioners shall find that any such application is not in proper form and does not contain the necessary and requisite information, it shall return such application for correction. If an application is found to be satisfactory, and if the filing and license fees, as herein prescribed, shall have been paid the state board of tax commissioners shall issue to the applicant a license for each store for which application for a license shall have been made. Each licensee shall display the license so issued in a conspicious place in the store for which license is issued.

Section 4. All licenses shall be so issued as to expire on the thirty-first day of December of each calendar year. On or before the first day of January of each year, every person, firm, corporation, association, or co-partnership having a license, shall apply to the state board of tax commissioners for a renewal license for the calendar year next ensuing. All applications for renewal licenses shall be made on forms which shall be prescribed and furnished by the state board of tax commissioners. No license shall lapse prior to the thirty-first day of January of the year next following the year for which such license was issued, and if, by such thirty-first day of January, an application for a renewal license has not been made, the state board of tax commissioners shall notify such delinquent license-holder thereof, by registered mail, and if application is not made for and a renewal license issued on or before the last day of February, next ensuing, the former license shall lapse and become null and void. Each such application for a renewal license shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this act.

[fol. 9] Section 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fees prescribed in sections 2 and 4 of this Act.

The license fees herein prescribed shall be as follows:

1. Upon one store, the annual license fee shall be three dollars for each such store;

2. Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

3. Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

4. Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

5. Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store.

Section 6. Each and every license issued prior to the first day of July of any year shall be charged for at the full rate, and each and every license issued on or after the first day of July of any year shall be charged for at one-half of the full rate, as prescribed in section 5 of this act.

Section 7. The provisions of this Act shall be construed to apply to every person, firm, corporation, co-partnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or [fol. 10] ultimately controlled or directed by one management or association of ultimate management.

Section 8. The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares, or merchandise of any kind, are sold, either at retail or wholesale.

Section 9. Any person, firm, corporation, co-partnership or association who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense.

Section 10. Any and all expenses incurred by the state board of tax commissioners in the administration of this Act shall be paid out of the funds accruing from the fees imposed by and collected under the provisions of this Act. All money collected under the provisions of this Act, less the expenses incurred in the administration of this Act, shall be paid into the state treasury, monthly, by the state

board of tax commissioners, and shall be added to and shall constitute a part of the general fund of the funds which shall accrue to the general fund during the fiscal year ending September 30, 1929, under the provisions of this act, the sum of two hundred and fifty-thousand dollars shall be transferred to the school relief fund by the auditor of state; and of the funds which accrue to the general fund under the provisions of this act during the fiscal year ending September 30, 1930, the sum of five hundred and fifty thousand dollars, and during the fiscal year ending September 30, 1931, the sum of five hundred thousand dollars, and during each fiscal year thereafter the sum of three hun- [fol. 11] dred thousand dollars shall be transferred to the school relief fund by the auditor of state. The transfer of such amount from the general fund to the school relief fund shall be made on the first day of January, 1930, and on the first day of January of each year thereafter, and no part of the money so transferred shall revert to the general fund at any time. The money so transferred shall be distributed in the same manner as the school relief fund is distributed, as provided by law, except that if any portion of such fund so transferred during any fiscal year is not needed in the regular school relief fund distribution, such excess may be used to apply on deficits existing from preceding years. The term "School Relief Fund" as used in this section shall be construed to mean that portion of the common school fund set apart by Sec. 3, Chap. 201, of the Acts of the General Assembly of 1921 and which is therein designated as a 'relief fund'."

Section 11. The State Board of Tax Commissioners is hereby authorized to employ such clerical assistants as may be necessary to carry out and administer the provisions of this Act, and to prepare and print such blanks, forms, reports, receipts and any and all other things which may be necessary to provide for the administration of this Act, and to pay any and all such expenses so incurred out of the fund collected under the provisions of this Act. The sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the general fund of the state treasury not otherwise appropriated, to be available upon the taking effect of this section, and to be used by the state board of tax commis-

sioners in defraying any expenses which may be incurred in the administration and in preparing to administer this act before sufficient funds shall have been collected from license fees, as hereinbefore provided. As soon as a sufficient amount of license fees shall have been collected under [fol. 12] the provisions of this Act, the two thousand dollars hereby appropriated, or so much thereof as shall have been used, shall be returned to the general fund. Whereas an emergency exists for the immediate taking effect of this section, the same shall be in full force and effect from and after its passage.

Section 12. If any section, provision or clause of this act should be declared invalid, such invalidity shall not be construed to effect the portions of the act not so held invalid.

Section 13. This Act, except Section 11, shall be in effect from and after the first day of July, 1929.

(Signed) James M. Knapp, Speaker of the House of Representatives. (Signed) Edgar D. Bush, President of the Senate.

Approved Mch. 16th, 1929. (Signed) Harry G. Leslie, Governor of the State of Indiana.

Filed Mar. 16, 1929, 4:20 P. M. Otto G. Fifield, Secretary of State.

[fol. 13] That under and by virtue of the terms of said Act hereinbefore set out, if the same should be held valid, the plaintiff and every other owner and operator of a store of any kind in the State of Indiana would be required to obtain a license from said defendant, State Board of Tax Commissioners of the State of Indiana in order to operate lawful businesses and in addition to paying a filing fee of fifty cents for each individual applicant would be required to pay the following annual license fees as fixed by section 5 of said Act.

"1. Upon one store, the annual license fee shall be three dollars for each such store;

2. Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

3. Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each additional store;

4. Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each additional store;

5. Upon each store in excess of twenty the annual license fee shall be twenty-five dollars for each such additional store."

That pursuant to the terms of said statute plaintiff would be required to pay an annual license fee of $5443.00 on the number of stores now owned and operated by him and an additional license fee of $25.00 for each additional store hereafter opened, established and maintained by him.

That by section 9 of said Act any person violating the provisions thereof is guilty of a misdemeanor and shall be [fol. 14] fined not less than $25.00 nor more than $100.00; and it is further provided that "each and every day that such violation shall continue shall constitute a separate and distinct offense."

That said Act becomes effective from and after July 1st, 1929 with the exception that as to Section 11 an emergency is declared and that said section is now effective and has been effective since March 16th, 1929; that said Section 11 provides for a preliminary appropriation of $2000.00 out of the general funds of the State of Indiana in its Treasury to enable the defendant, State Board of Tax Commissioners of the State of Indiana, to prepare for and administer said law before any license or filing fees have been collected and with the further provision that when license and filing fees have been collected that the general fund of the State Treasury shall be reimbursed to the extent of such expenditures. Plaintiff is informed and believes, and upon such information and belief avers the fact to be that the State Board of Tax Commissioners of the State of Indiana is preparing for the administration and enforcement of said Act; has already actually expended moneys out of the State Treasury for the purpose of preparing application blanks and other forms necessary in the administration and enforcement of said law and that unless enjoined and re-

strained by this court all of the defendants hereto will administer said law and expend funds raised by taxation for the enforcement thereof; will require the plaintiff and all owners and operators of stores in the State of Indiana to pay the license and filing fees prescribed by said Act and that upon the failure of said store owners, including [fol. 15] the plaintiff, to make said payments, the said defendants will attempt to enforce against said store owners, including this plaintiff, the drastic penalties provided for by section 9 of said act and will attempt to enforce against the plaintiff and other store owners in the State of Indiana any other penalties or causes of action provided for by the statutes or general law of said State, all to the irreparable injury and damage of this plaintiff and other store owners similarly situated.

8. That said act of Indiana General Assembly known as Enrolled House Bill No. 197 (Chapter 207 of the Acts of the Indiana General Assembly for the year 1929) will be included in the published acts of the State of Indiana and will, in accordance with law, be proclaimed by the Governor of the State of Indiana as a valid statute on or about the 15th day of May, and unless its enforcement is enjoined by this court will become effective July 1st, 1929, except as to said Section 11 which by the terms of said Act is made immediately effective.

9. Plaintiff avers that said act of the Indiana General Assembly for the year 1929 known as Enrolled House Bill No. 197 (Chapter 207 of the Acts of the Indiana General Assembly for the year 1929) is unconstitutional, invalid and void for the following reasons and each of them, to wit:

First. Said act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of his property without due process of law and denies to the plaintiff the equal protection of the laws in the following particulars:

(a) Said Act is, in effect, a tax measure and has nothing to do with the exercise of the police power of the State; it [fol. 16] has no relation to the public health, the public welfare, the public morals or public safety; it is not an attempt to regulate the business of any corporation or individual

whose business or property is affected with a public interest; it is not an inspection measure in which fees are prescribed for the purpose of covering the cost of making the inspection. As a tax measure its operation is not equal or uniform and the classification made by the terms of the act is oppressive, unreasonable and arbitrary, and does not rest upon any reasonable basis.

(b) The classification made as a basis for the tax imposed rests wholly upon the number of stores owned, operated or maintained by a given individual, co-partnership or corporation and the tax provided for is graduated, amounting to $3.00 for the first store; $5.00 each for two stores or more not exceeding five; $10.00 for each store in excess of five, but not exceeding ten; $20.00 for each store in excess of ten, but not exceeding twenty and $25.00 for each store in excess of twenty-five. Such a classification is arbitrary and unreasonable and has no relation to the amount of business actually transacted by the person or corporation to be licensed, to the profits made by the individual or corporation out of his or its business, to the number or amount of sales consummated in such business or to any other factor having any relation to the volume of the business or the amount of property used in the transaction of that business.

(c) There is no basis for the classification fixed by said act and said classification is unjust, oppressive, unreasonable, discriminatory and arbitrary.

[fol. 17] (d) The act in question is directed against persons owning and operating more than one individual store, without regard to the amount of sales of said stores or the property employed in operating the same and such a basis of classification rests upon no reasonable, proper or legal ground.

(e) The act in question, although directly imposing a tax makes it unlawful for a person engaged in a lawful business, viz: the operation of a store to continue to engage in such business without obtaining a license or permit so to do and paying the license and filing fees prescribed by the act although said act is not based on an exercise of the police power and said act imposes heavy penalties upon the person or corporation failing to procure such a license, which penalties are imposed for each day such failure continues

and obedience is thus required to an invalid law by excessive and drastic penalties.

(f) The General Assembly of Indiana has no right under the guise of a licensing measure to require the owner of a store engaged in a lawful business to obtain a license as a condition precedent to the continuance of that business where the licensing feature of the act has no relation to the public health, the public welfare, the public morals or the public safety.

Second. Said act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarranted abridgement of the rights and privileges guaranteed to the plaintiff by said Fourteenth [fol. 18] Amendment in each of the following particulars:

(a) Said act in its provisions is partial, unreasonable, arbitrary and unequal.

(b) The classification fixed by said law rests upon no sound or reasonable basis, but is wholly arbitrary.

(c) Said act requires the plaintiff and other persons, co-partnerships and corporations engaged in a lawful business, viz: the operation of stores to obtain a license as a condition precedent to continuing in said business, although said act was not passed in exercise of the police power, but is purely a tax measure.

(d) The fees required to be paid under the terms and provisions of said act are unequal, discriminatory and based on a classification that is wholly arbitrary and unjust, and discriminate against the owners and operators of two or more stores in favor of persons, co-partnerships and associations owning and operating but a single store.

(e) Said act is unjust and unreasonably discriminatory in that the basis of taxation is not fixed with reference to the amount of business done, the property employed in such business, or upon any other reasonable or just basis.

Third. That said act is invalid because it violates section 23 of article 1 of the Bill of Rights of the Constitution of Indiana which provides that:

"The General Assembly shall not grant to any citizen or class of citizens privileges and immunities which upon the same terms shall not equally belong to all citizens."

for the following reasons and each of them, towit:

(a) Because said act grants to the owners and operators [fol. 19] of a single store privileges and immunities which it does not grant upon the same terms to the plaintiff and other owners and operators of more than one store.

(b) There is no basis for the classifications fixed by said act and said classification is unjust, unreasonable, arbitrary, oppressive and discriminatory.

Fourth. That said act violates section 1 of article 10 of the Indiana Constitution which reads as follows:

"The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes as may be especially exempted by law."

for each of the following reasons:

(a) Said act, in effect, is a tax measure and provides for a rate of assessment and taxation which is not uniform and which requires different people similarly situated to pay an unequal rate of assessment and taxation; that in this particular the plaintiff, because of the fact that he owns and operates 225 stores, will be required to pay a tax more than eighteen hundred times as much as other individuals and corporations engaged in business in the City of Indianapolis, Marion County, Indiana, owning and operating a single store, but employing more capital than the plaintiff and having larger annual sales than the plaintiff.

That for the reasons above stated and each of them said act is unconstitutional and void under both the State and Federal Constitutions.

[fol. 20] 10. Plaintiff further avers that unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce said act that the plaintiff and all others similarly situated will sustain irreparable loss and injury in each of the following particulars:

(a) That plaintiff and all others similarly situated will be compelled to pay taxes imposed pursuant to an invalid

and unconstitutional enactment and for which they are not legally liable.

(b) That upon the failure of the plaintiff and others similarly situated to pay said illegal taxes the drastic penalties provided by said act will be attempted to be enforced by the defendants against the plaintiff and others similarly situated at the rate of not less than $25.00 nor more than $100 per day for each day each owner of a store in the State of Indiana refuses to comply with said act, and that as a result thereof plaintiff and others similarly situated will be compelled to defend innumerable actions at law brought to recover said penalties, all at great expense.

(c) That the defendant, State Board of Tax Commissioners of the State of Indiana will expend public funds raised by taxation for the purpose of preparing to enforce and enforcing said act, to the irreparable injury and damage of the plaintiff as a taxpayer of the State of Indiana.

(d) That if plaintiff and others similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same they would be put to large expense for attorneys' fees and court costs and would be required to bring a multiplicity of actions in order to recover [fol. 21] said moneys and under the laws of the State of Indiana, after having obtained a judgment for such claims, would be compelled to apply to the General Assembly of the State of Indiana for an appropriation for each of such claims before being able to obtain a return of the money so illegally paid and could not be repaid unless the General Assembly in its discretion should make such appropriations.

(e) That the enforcement of said illegal and unconstitutional act against the plaintiff and others similarly situated will result in a substantial diminution in the value of the property employed by them respectively in their businesses, which loss will be large in amount, but which can not be measured by any damages.

(f) That if said illegal and unconstitutional act is enforced against the plaintiff and others similarly situated there will be a substantial decrease in the amount of annual business done by them respectively.

(g) The enforcement of said act will have the effect of injuring or impairing all lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage, which right is guaranteed by both the State and Federal Constitutions.

Inasmuch, therefore, as the plaintiff is without adequate remedy at law and can obtain relief only in a court of equity, the plaintiff prays:

1. That writs of subpoena be issued to each of said defendants requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all [fols. 22 & 23] of said defendants.

2. That each and all of said defendants and their successors in office be enjoined and restrained, after final hearing, from enforcing against the plaintiff and all other owners and operators of two or more stores in the State of Indiana the provisions of said act of the General Assembly of the State of Indiana known as Enrolled House Bill No. 197, being Chapter 207 of the Acts of the Indiana General Assembly for the year 1929, directly or indirectly; from instituting or maintaining any actions at law or suits in equity to recover from or of the plaintiff and others similarly situated any of the penalties prescribed by said act; from expending any moneys raised by taxation or otherwise in enforcing or preparing for the enforcement of said act; from requiring the plaintiff and others similarly situated to obtain a license or licenses before continuing or as a condition to continuing the operation of their respective stores within the State of Indiana.

3. That upon the final hearing of this cause said Enrolled House Bill No. 197 be declared unconstitutional and void as violative of the Constitution of the United States and the Constitution of the State of Indiana; and for all other relief agre-able to equity and good conscience.

LaFayette A. Jackson, by Samuel Ashby, McKercker & Link, Smith, Remster, Hornbrook & Smith, Nichols, Morrill, Wood, Marx & Ginter, Thompson, Rabb & Stevenson, Solicitors for Plaintiff. Samuel Ashby, Henry H. Hornbrook, William H. Thompson, of Counsel.

[fols. 24 & 25] Subpœna in equity and service upon Wm. A. Hough et al., omitted in printing.

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT—Filed May 9, 1929

Come now the defendants, State Board of Tax Commissioners of the State of Indiana, Wililam A. Hough, Pliny H. Wolford, and Philip Zoercher, as members of State Board of Tax Commissioners of the State of Indiana, and James M. Ogden, Attorney General of the State of Indiana, and separately and severally move the court to dismiss the bill of complaint herein in the above entitled cause upon the following grounds:

1. That the bill of complaint does not state facts sufficient to entitle complainant to any relief, there being no equity stated in the bill of complaint.

2. That the bill of complaint does not state facts sufficient to constitute a valid cause of action in equity.

[fol. 27] That said bill of complaint does not state facts sufficient to constitute a cause of action in equity in that, whereas:

(a) The right, if any, to the relief prayed for is based upon the alleged unconstitutionality of Chapter 207 of the Acts of 1929 of the General Assembly of Indiana, in that said Chapter 207 is alleged to be in violation of the Fourteenth Amendment to the United States Constitution and in violation of Article 1, section 23 and Article 10, section 1 of the Indiana Constitution;

(b) Said Chapter 207 set out *in extenso* in said bill of complaint is constitutional and valid and not open to the objections raised by said bill of complaint.

(c) Said Chapter 207 does not deprive the plaintiff of his property without due process of law and does not deny him the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

Said Chapter 207 was enacted in the exercise of the taxing power of the state and in the exercise of a valid discretion vested in the State Legislature to select certain classes of business upon which to impose the tax therein levied.

(d) Said Chapter 207 is not an unwarranted abridgement of the rights and privileges guaranteed to the plain-[fol. 28] tiff by the Fourteenth Amendment to the United States Constitution. The subject matter of said Chapter 207 is clearly within the taxing power of the state and is not repugnant to the due process or equal protection provision of the Fourteenth Amendment to the United States Constitution. It necessarily follows that it is not repugnant to the abridgement of privileges or immunities clause of said amendment.

(e) Said Chapter 207 does not violate Article 1, section 23 of the Indiana Constitution. As already stated it was enacted in the exercise of a valid discretion vested in the legislature to select the occupations upon which to impose the tax and is not unreasonable and arbitrary.

(f) Said Chapter 207 does not violate Article 10, section 1 of the Indiana Constitution. The above section relates to a property tax as distinguished from an occupation tax and has no application to said Chapter 207, in addition to which the classifications provided in said Chapter 207 are not unreasonable and arbitrary and the tax imposed operates uniformly upon every person within any designated class.

(g) Said Chapter 207 is not reputnant to any provision of the Constitution of the United States or to any provision of the Constitution of Indiana.

Wherefore said defendants pray that the bill of complaint herein may be dismissed.

James M. Ogden, as Attorney General of Indiana; State Board of Tax Commissioners, by Owen S. Boling, Secretary; William A. Hough, Pliny H. Wolford, Philip Zoercher, as Members of State Board of Tax Commissioners of the State of Indiana, Defendants. James M. Ogden, Attorney General; Joseph W. Hutchinson, Deputy Attorney General, Solicitors for Defendants.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

BRIEF IN SUPPORT OF MOTION TO DISMISS

I

In General

The Bill of Complaint in the above cause seeks relief by injunction enjoining the defendants from enforcing or attempting to enforce Chapter 207 of the Acts of the General Assembly of the State of Indiana, enacted at its 1929 ses-
[fol. 30] sion. The Bill of Complaint sets out the official relation of each of the defendants to the enforcement of the act in question and that unless enjoined from doing so will proceed to enforce the act. A copy of the act is set out in the Bill, and for the convenience of the court is set out herein as follows:

"Enrolled Act No. 197, House

An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state board of tax commissioners in connection therewith, and prescribing penalties for the violation thereof

Section 1. Be it enacted by the General Assembly of the State of Indiana, That from and after the first day of July, 1929, it shall be unlawful for any person, firm, corporation, association or co-partnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained a license so to do from the state board of tax commissioners, as hereinafter provided.

Section 2. Any person, firm, corporation, association or co-partnership desiring to operate, maintain, open or establish a store in this state shall apply to the state board of tax commissioners for a license so to do. The application for a license shall be made on a form which shall be pre-

scribed and furnished by the state board of tax commissioners, and shall set forth the name of the owner, manager, trustee, lessee, receiver or other person desiring such license; the name of such store; the location, including the street number, of each store; and such other facts as the state board of tax commissioners may require. If the applicant desires to operate, maintain, open or establish more than one such store, he shall make a separate application for a license to operate, maintain, open or establish each such store, but the respective stores for which the applicant desires to secure licenses may all be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this Act.

Section 3. As soon as practicable after the receipt of any such application, the state board of tax commissioners shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If, upon examination, the state board of tax commissioners shall find that any such appli- [fol. 31] cation is not in proper form and does not contain the necessary and requisite information, it shall return such application for correction. If an application is found to be satisfactory, and if the filing and license fees, as herein prescribed, shall have been paid the state board of tax commissioners shall issue to the applicant a license for each store for which application for a license shall have been made. Each licensee shall display the license so issued in a conspicious place in the store for which license is issued.

Section 4. All licenses shall be so issued as to expire on the thirty-first day of December of each calendar year. On or before the first day of January of each year, every person, firm, corporation, association, or co-partnership having a license, shall apply to the state board of tax commissioners for a renewal license for the calendar year next ensuing. All applications for renewal licenses shall be made on forms which shall be prescribed and furnished by the state board of tax commissioners. No license shall lapse prior to the thirty-first day of January of the year next following the year for which such license was issued.

and if, by such thirty-first day of January, an application for a renewal license has not been made, the state board of tax commissioners shall notify such delinquent licenseholder thereof, by registered mail, and if application is not made for a renewal license issued on or before the last day of February, next ensuing, the former license shall lapse and become null and void. Each such application for a renewal license shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this act.

Section 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fees prescribed in sections 2 and 4 of this Act.

The license fees herein prescribed shall be as follows:

1. Upon one store, the annual license fee shall be three dollars for ach such store;

2. Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

3. Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

4. Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

[fol. 32] 5. Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store.

Section 6. Each and every license issued prior to the first day of July of any year shall be charged for at the full rate, and each and very license issued on or after the first day

of July of any year shall be charged for at one-half of the full rate, as prescribed in section 5 o this act.

Section 7. The provisions of this Act shall be construed to apply to every person, firm, corporation, co-partnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section 8. The term 'store' as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares, or merchandise of any kind, are sold, either at retail or wholesale.

Section 9. Any person, firm, corporation, co-partnership or association who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nore more than one hundred dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense.

Section 10. Any and all expenses incurred by the state board of tax commissioners in the administration of this act shall be paid out of the funds accruing from the fees imposed by and collected under the provisions of this act. All money collected under the provisions of this Act, less the expenses incurred in the administration of this Act, shall be paid into the state treasury, monthly, by the state board of tax commissioners, and shall be added to and shall constitute a part of the general fund of the funds which shall accrue to the general fund during the fiscal year ending September 30, 1929, under the provisions of this act, the sum of two hundred and fifty-thousand dollars shall be transferred to the school relief fund by the auditor of state; and of the funds which accrue to the general fund under the provisions of this act during the fiscal year ending September 30, 1930, the sum of five hundred and fifty thousand dollars, and during the fiscal year ending September 30, 1931, the sum of five hundred thousand dollars, and during

each fiscal year thereafter the sum of three hundred thousand dollars shall be transferred to the school relief fund by the auditor of state. The transfer of such amount from the general fund to the school relief fund shall be made on [fol. 33] the first day of January, 1930, and on the first day of January of each year thereafter, and no part of the money so transferred shall revert to the general fund at any time. The money so transferred shall be distributed in the same manner as the school relief fund is distributed, as provided by law, except that if any portion of such fund so transferred during any fiscal year is not needed in the regular school relief fund distribution, such excess may be used to apply on deficits existing from preceding years. The term 'School Relief Fund' as used in this section shall be construed to mean that portion of the common school fund set apart by Sec. 3, Chap. 201, of the Acts of the General Assembly of 1921 and which is therein designated as a 'relief fund.'

Section 11. The State Board of Tax Commissioners is hereby authorized to employ such clerical assistants as may be necessary to carry out and administer the provisions of this Act, and to prepare and print such blanks, forms, reports, receipts and any and all other things which may be necessary to provide for the administration of this Act, and to pay any and all such expenses so incurred out of the fund collected under the provisions of this Act. The sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the general fund of the state treasury not otherwise appropriated, to be available upon the taking effect of this section, and to be used by the state board of tax commissioners in defraying any expenses which may be incurred in the administration and in preparing to administer this act before sufficient funds shall have been collected from license fees, as hereinbefore provided. As soon as a sufficient amount of license fees shall have been collected under the provisions of this Act, the two thousand dollars hereby appropriated, or so much thereof as shall have been used, shall be returned to the general fund. Whereas an emergency exists for the immediate taking effect of this section, the same shall be in full force and effect from and after its passage.

Section 12. If any section, provision or clause of this act should be declared invalid, such invalidity shall not be construed to effect the portions of the act not so held invalid.

Section 13. This Act, except Section 11, shall be in effect from and after the first day of July, 1929."

It is alleged further that the plaintiff is a citizen and resident of Marion County, Indiana and the owner and operator of 225 stores in the City of Indianapolis, each situated at different locations and from which he sells groceries, [fol. 34] fresh vegetables and meats at wholesale and at retail. The amount in controversy is alleged to exceed the sum of Three Thousand Dollars, exclusive of interest and costs.

The basis for the relief prayed for is the claim that the above Act of the General Assembly of the State of Indiana is unconstitutional and void because,

First. "Said Act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of his property without due process of law and denies to the plaintiff the equal protection of the laws in the following particulars", naming six such particulars;

Second. "Said Act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarranted abridgement of the rights and privileges guaranteed to the plaintiff by said Fourteenth Amendment in each of the following particulars," naming five such particulars;

Third. "That said Act is invalid because it violates Section 23 of Article 1 of the Bill of Rights of the Constitution of Indiana", assigning two separate grounds.

Fourth. "That said Act violates section 1 of article 10 of the Indiana Constitution", assigning one ground therefor.

It is the contention of the defendants that the above Act of the General Assembly of the State of Indiana is constitutional, and in support of its contention submits the following propositions, points and authorities in the same or-

der as the claims of unconstitutionality are alleged in the Bill of Complaint.

[fol. 35] II

Propositions with Points and Authorities

I. The Act of the General Assembly of Indiana in question, (Chapter 207 of the Acts of the Indiana General Assembly of the year 1929) does not deprive the plaintiff of his property without due process of law and does not deny to the plaintiff the equal protection of the laws and is not violative of the Fourteenth Amendment to the Constitution of the United States.

NOTE.—There are six separate particulars set out in the Bill of Complaint by reason of which it is claimed that the Act violates the Fourteenth Amendment to the United States Constitution. They may very properly be condensed into three namely:

(a). The measure is a tax measure and in its operation it is not equal and uniform and the classification is oppressive, unreasonable and arbitrary and does not rest upon any reasonable basis.

(b). The penalties provided are excessive and drastic and unlawful as a means of enforcing a tax act.

(c). The General Assembly of Indiana has no right under the guise of a licensing measure to require the owner of a store engaged in a lawful business to obtain a license as a condition precedent to the continuance of the business in a case in which the licensing feature of the act has no relation to the public health, the public welfare, the public morals or the public safety.

[fol. 36] Points Addressed to (a), Supra

Point 1. The taxing power of the State is one of the highest attributes of sovereignty, essential to its continued existence, and may be exercised without limitation on all property, trades and business carried on within its boundaries unless prohibited by the State or Federal constitution.

Railroad Company vs. Peniston, 85 U. S. 5 at page 22.

Point 2. In the exercise of its taxing power, the State, in the discretion of its legislature may levy a privilege or occupation tax on all occupations or business, or it may select for taxation certain classes and leave the others untaxed.

Armour Packing Co. v. Lacy, 200 U. S. 226 at p. 235;
Southwestern Oil Co. v. Texas, 217 U. S. 114 at pp. 124, 125 and 126;
Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232 at page 237;
American Sugar Refining Co. v. Louisiana, 179 U. S. 89 at page 94;
Hart Refineries v. Harmon, Treas., 49 Supreme Court Reporter 188 at page 189.

Point 3. In cases in which the legislature selects certain classes for taxation, the classes so selected may be further subdivided according to certain differences without violating the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States, if the subdivisions are reasonable.

[fol. 37] Cooley on Taxation (4th ed.) secs. 349-350;
Southwestern Oil Co. v. Texas, 217 U. S. 114 at p. 126;
Michigan Railroad Tax Cases, 138 Fed. 223 at p. 241.

Point 4. In determining whether a classification for an occupation tax is reasonable, the motives or special reasons actuating the legislature is of no concern to the court; neither is the wisdom of the classification of consequence. The determining factor lies in the answer to the question, Does the burden fall alike upon all who are in substantially the same situation?

Cooley on Taxation (4th ed.) sec. 350;
Southwestern Oil Co. v. Texas, 217 U. S. 114 at p. 126;
Oliver Iron Co. v. Lord, 262 U. S. 172 at p. 179;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245 at p. 293;
Dane v. Jackson, 256 U. S. 589 at pp. 598-599;
Citizens Telephone Co. v. Fuller, 229 U. S. 322 at pp. 329-331;

Point 5. The imposition of an occupation tax in different amounts upon different occupations is not a denial of due process or equal protection of the laws.

Oliver Iron Co. v. Lord, 262 U. S. 172 at p. 179.

Point 6. A state does not deny equal protection of the laws by adjusting its revenue laws so as to favor certain industries or industries carried on in a specified manner.

Quong Wing v. Kirkendall, etc., 223 U. S. 59 at pp. 62-63.

Metropolis Theatre Co. v. Chicago, 228 U. S. 61 at p. 69.

[fol. 38] Point 7. The classification of occupations for taxation provided by Chapter 207 of the Acts of the General Assembly of Indiana of the year 1929 selects all stores in which goods, wares or merchandise of any kind are sold either at retail or wholesale. Such a selection is clearly not open to objection. The fact that everyone owning and operating one store is required to pay the same tax irrespective of amount of business done would not operate to strike down the law. The tax is charged for the privilege of operating one store, and so long as the tax provisions of the act operate upon all such owners and operators alike, as is the case with the Act under consideration, it is not open to the objection that it violates the Fourteenth Amendment.

Sec. 1 of Chap. 207, Acts of General Assembly of Indiana, 1929;

Sec. 5 of Chap. 207, Acts of General Assembly of Indiana, 1929;

Railroad Company v. Peniston, 85 U. S. 5 at p. 29;

Armour Packing Co. v. Lacy, 200 U. S. 226 at p. 235;

Southwestern Oil Co. v. Texas, 217 U. S. 114 at pp. 124, 125 and 126;

Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232 at p. 237;

American Sugar Refining Co. v. Louisiana, 179 U. S. 89 at p. 94;

Hart Refineries v. Harmon, Treas., 49 Sup. Ct. Rep. 188 at p. 189;

Cooley on Taxation, (4th ed.) secs. 349-350;

Michigan Railroad Tax Cases, 138 Fed. 223 at p. 241;
[fol. 39] Oliver Iron Co. v. Lord, 262 U. S. 172 at p. 179;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245 at page 293;
Dane v. Jackson, 256 U. S. 589 at pp. 598-599;
Citizen's Telephone Co. v. Fuller, 229 U. S. 322 at pp. 329-331.

Point 8. The first store of any group under the classification made by the Act in question is required to pay the same tax; the second, third, fourth and fifth stores of any group are likewise required to pay the same tax as the same numbers in any other group large or small; the sixth, seventh, eighth, ninth and tenth stores of any group are likewise required to pay the same tax as the same numbers in any other group large or small and so on. In other words, every person in the same situation with respect to number of stores operated at different locations under the same management is required to pay exactly the same tax and the fact that a given person may operate numerous stores does not increase the tax on the first store, or on any of the remainder of the second group and so on. The tax provision operates uniformly as to each classification and of this there can be no doubt. The burden falls alike upon all in the same situation.

Cooley on Taxation (4th ed.) sec. 350;
Southwestern Oil Co. v. Texas, 217 U. S. 114 at p. 126;
Oliver Iron Co. v. Lord, 262 U. S. 172 at p. 179;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245 at p. 293;
Dane v. Jackson, 256 U. S. 589 at pp. 598-599;
Citizen's Telephone Co. v. Fuller, 229 U. S. 322 at p. 331.

[fol. 40] Point 9. The classification is not arbitrary. The plaintiff has a reason for desiring to divide his capital of $200,000, into 225 stores at different locations in preference to concentrating at one location, thus limiting the number of single proprietorships. And under the authorities the State has a perfect right to promote individual proprietor-

ship of single stores by adjusting its revenue laws so as to favor them.

Quong Wing v. Kirkendall, etc., 223 U. S. 59 at pp. 62-63;
Metropolis Theatre Co. v. Chicago, 228 U. S. 61 at p. 69.

Point 10. The classification is not in violation of the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

Quong Wing v. Kirkendall, etc., supra;
Metropolis Theatre Co. v. Chicago, supra;
Southwestern Oil Co. v. Texas, supra;
Oliver Iron Co. v. Lord, supra.

Points Addressed to (b) Supra

Point 11. The provision of the Act in question with reference to the imposition of penalties for its violation does not transgress any constitutional provision. Payment of occupation taxes may be enforced by fine if the law-making body deems it proper.

Cooley on Taxation (4th Ed.) sec. 1717.

Points Addressed to (c) Supra

Point 12. An occupation may be lawful in itself and not subject to prohibition or regulation by the State under the police power, and yet may be prohibited in order to compel the taking out of a license for the purpose of raising reve-[fol. 41] nue.

Banta v. City of Chicago, 172 Ill. 204 at p. 219;
Cooley on Taxation (4th ed.) Sec. 1679.

II. Said Act is not an unwarranted abridgement of the rights and privileges guaranteed to the plaintiff by the Fourteenth Amendment to the United States Constitution.

NOTE.—The five specifications set out in the Bill of Complaint in which it is claimed the Act in question abridges the plaintiff's rights and privileges guaranteed under the Fourteenth Amendment are fairly embraced under the specifications as to denial of due process and equal protection of the laws.

Point 1. Since the subject matter of the Act in question is plainly within the legislative authority of the State (the taxing power) and since the Act is not repugnant to the due process and equal protection provisions of the Fourteenth Amendment, it necessarily follows that it is not repugnant to the abridgement of privileges or immunities clause of the Fourteenth Amendment.

Armour & Co. v. Virginia, 246 U. S. 1 at p. 6.

Point 2. There is no unwarranted abridgement of the rights and privileges guaranteed to the plaintiff by the Fourteenth Amendment by the imposition of an occupation tax which operates uniformly upon all within the class to which he belongs.

American Sugar Refining Co. v. Louisiana, 179 U. S. 89 at p. 94;

[fol. 42] Armour Packing Co. v. Lacy, 200 U. S. 226 at p. 235;

Southwestern Oil Co. v. Texas, 217 U. S. 114 at pp. 124, 125 and 126;

Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232 at page 237;

American Sugar Refining Co. v. Louisiana, 179 U. S. 89 at page 94;

Hart Refineries v. Harmon, Treas., 49 Supreme Court Reporter 188 at page 189.

III. The Act in question does not violate section 23 of Article 1 of the Indiana Constitution providing that,

"The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Note.—The various specifications in the Bill of Complaint all relate to the subject of classification, as to which the authorities already cited are applicable. In addition, the following are cited.

Point 1. In determining questions arising under a state constitution, the United States Courts will follow the decisions of the highest court of such state in interpreting its own constitution.

Douglas v. Noble, 261 U. S. 165 at p. 168.

Point 2. The subjects and methods of taxation are legislative matters, and can not be disturbed so long as the method prescribed is applicable alike to all within the pre-
[fol. 43] scribed class. Corporations, individuals, wholesale and retail dealers, domestic and foreign corporations, may be separately classified, and taxed differently, so long as the constituent classes are treated alike.

Kersey v. City of Terre Haute, 161 Ind. 471 at p. 472, et seq.;
State, ex rel. Lewis, et al. v. Smith, Aud., 158 Ind. 543 at p. 546;
Gafill v. Bracken, Aud., 195 Ind. 551 at p. 560.

Point 3. The power to tax is essentially legislative in its character, and it is not required, under the provision of section 23 of article 1 of the Indiana Constitution that there should be such an exact exclusion and inclusion of the subjects of taxation as to meet fully the approval of the judicial mind as to what is reasonable. It is only palpable abuses of the power that the courts assume to overthrow.

Kersey v. City of Terre Haute, 161 Ind. 471 at p. 474.

Point 4. The classification for taxation in the Act in question is reasonable and the operation of the law is uniform within the designated classes.

IV. The Act in question does not violate section 1 of article 10 of the Indiana Constitution providing that:

"The General Assembly shall provide, by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, [fol. 44] scientific, religious or charitable purposes, as may be especially exempted by law."

Point 1. The Act in question is not a property tax and the above provision of the Constitution of Indiana is wholly inapplicable. The Act does not impose a tax on the contents of plaintiff's stores but upon the sale or use of their contents.

Gafill v. Bracken, Aud. 195 Ind. 551 at p. 559.

Point 2. The classification in the Act in question, does not offend against any constitutional limitations.

Point 3. The Act in question is valid as against all constitutional objections. The motion to dismiss the bill of complaint should be sustained.

Respectfully submitted.

James M. Ogden, Attorney General; Joseph W. Hutchinson, Deputy Attorney General, Solicitors for Defendants.

Note

By agreement of counsel seven days additional time from May 9, 1929 is given for further elaboration of this brief by argument and further citation of authorities.

James M. Ogden, Attorney General; Joseph W. Hutchison, Deputy Attorney General, Solicitors for Defendants.

LAH.

[fol. 45] In United States District Court

Order Overruling Motion to Dismiss—June 21, 1929

Come now the parties by their respective solicitors and the defendants' motion to dismiss the bill of complaint herein, is submitted to the Court, and the Court being duly advised orders that said motion to dismiss be and the same is hereby overruled, to which ruling of the Court said defendants separately and severally except.

[fol. 46] In United States District Court

Temporary Injunction—June 28, 1929

Comes now the plaintiff in the above entitled cause by Samuel Ashby, Henry H. Hornbrook and William H. Thompson, his solicitors, and come now the defendants by James M. Ogden, Attorney General of the State of Indiana, Joseph W. Hutchinson, George W. Hufsmith and V. Ed

Funk, Deputy Attorney Generals of the State of Indiana, solicitors for defendants.

And it appearing to the Court that all of the defendants in the above entitled cause were duly notified of the time and place of this hearing and that a like notice was given to the Governor and to the Attorney General of the State of Indiana, all of said notices having been served more than five days prior to this hearing, and said application for an interlocutory injunction is now submitted to the court, and the court having seen and inspected the verified application of the plaintiff in this cause for an interlocutory injunction filed herein on the 21st day of June, 1929, and having seen and inspected all affidavits filed by the plaintiff in support of such application and having heard all of the evidence offered by any party in said cause on said application now finds that immediate and irreparable injury, loss and damage may accrue to the plaintiff and to the owners and operators of all other stores in the State of Indiana unless an interlocutory injunction is granted as prayed for in said verified application and that such irreparable injury, loss and damage may accrue to the plaintiff and such other store owners before this cause can be [fol. 47] finally heard and disposed of in this towit: Because plaintiff and such other store owners have no adequate remedy at law and because unless said interlocutory injunction is issued, the plaintiff and all other store owners in Indiana will be compelled to comply with an Act of the Indiana General Assembly approved March 16, 1929, (Acts 1929, page 693, being Chapter 207 of the Acts of the Indiana General Assembly for the year 1929, which Act is asserted by plaintiff and such other store owners to be in violation of rights guaranteed to the plaintiff and such other store owners by the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Indiana and because plaintiff and such other store owners will be compelled to pay into the treasury of the State of Indiana large sums of money in pursuance of said Act asserted by them to be invalid, which sums of money can never be recovered by them except by and with the consent of the General Assembly of the State of Indiana and that upon failure to make said payments the

plaintiff and such other store owners will be subjected to the drastic penalties provided for in such Act.

It is therefore ordered, adjudged and decreed by the Court that said defendants, and each of them their successors in office, their agents, servants, employes and attorneys be and they are hereby enjoined and restrained:

First. From enforcing or attempting to enforce in any way, directly or indirectly, against the plaintiff or any other store owner in the State of Indiana, being the persons, firms, corporations, associations or co-partnerships, either foreign or domestic, who operate, open maintain or establish any store in the State of Indiana, any of the pro- [fol. 48] visions of an Act of the Indiana General Assembly approved March 16, 1929, entitled:

"An act requiring licenses for the operation maintenance, opening or establishing of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the State Board of Tax Commissioners in connection therewith, and prescribing penalties for the violation thereof."

which Act is Chapter 207 of the Acts of the Indiana General Assembly for the year 1929, (Acts 1929 page 693 et seq.)

Second. From enforcing or attempting to enforce against the plaintiff or any other store owner in the State of Indiana as above described, any penalty or penalties for the failure on the part of the plaintiff or such store owner to apply for or obtain a license under said Act or to pay license fees from the 1st day of July, 1929, to the final determination of this cause.

Third. From instituting or maintaining any actions at law or suits in equity to recover from or of the plaintiff or such other store owners as above described any of the penalties provided for by said Act.

Fourth. From requiring plaintiff and other store owners in the State of Indiana, as above described, to file applications or obtain a license or licenses before continuing or as a condition to continuing the operation of their respective stores within the State of Indiana.

Fifth. From requiring the plaintiff or such other store owners, as above described, to pay any filing or license fees under the provisions of said Act until the final determination of this cause.

This interlocutory injunction shall not be effective until the filing by the plaintiff in this cause in this court of a [fols. 49 & 50] bond, with surety to be approved by the court, in the penal sum of Twenty-Five Hundred Dollars ($2500) conditioned upon the payment of such costs and damages as may be incurred or suffered by any of the defendants who may be found to have been wrongfully restrained by this interlocutory injunction.

And now the plaintiff in open court, tenders and files his bond, executed by himself as principal, and by American Surety Company of New York as surety, in the penal sum of $2500.00, conditioned as aforesaid, which bond the court now approves; and now said bond having been filed and approved, this interlocutory injunction is in full force and effect from and after 10:00 o'clock A. M., June 28, 1929, and shall remain in full force and effect until the final determination of this cause or until the further order of this Court.

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Aug. 10, 1929

To the Honorable Judge of the District Court of the United States for the Southern District of Indiana:

The State Board of Tax Commissioners of the State of Indiana, William A. Hough, Pliny H. Wolford, and Philip Zoercher, as members of The State Board of Tax Commissioners of the State of Indiana, and James M. Ogden, as Attorney General of the State of Indiana, defendants herein, for answer to the bill of complaint filed herein by LaFayette A. Jackson, as plaintiff, doing business as "Standard Grocery Company," allege and say:

I

That defendants admits that the plaintiff herein, LaFayette A. Jackson, was on April 19, 1929, the date of the filing

of his complaint and for thirty years or more immediately preceding said date, a resident of the City of Indianapolis, Marion County, Indiana, and a citizen of Indiana.

[fol. 52] II

That defendants further admit that the defendants, William A. Hough, Pliny H. Wolford and Philip Zoercher are the duly and legally appointed, qualified and acting members of The State Board of Tax Commissioners of the State of Indiana and as such are the only members of said Commission; that said Commission was created pursuant to an act of the General Assembly of the State of Indiana and has been in existence, in pursuance of law, for more than twenty years last past; that under and by virtue of the terms of Enrolled House Bill 197 of the Acts of the Indiana General Assembly of the State of Indiana for the year 1929, the defendant, The State Board of Tax Commissioners of the State of Indiana, is charged with the duty of preparing blank forms of application to be made out by persons desiring to be licensed under said Act, with the issuance of licenses thereunder, with the collections of license fees from such applicants, and the payment of such fees into the State Treasury monthly, is authorized to employ clerical assistants to carry out the terms of said Act and generally charged with the administration of said law; and that James M. Ogden, defendant herein, is the duly elected, qualified and acting Attorney General of the State of Indiana, but the defendants herein deny that said defendant James M. Ogden as Attorney General of the State of Indiana is charged by law with the duty of enforcing the valid statutes of the State of Indiana.

III

The defendants further admit that the amount in controversy in this cause exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

IV

The defandants further admit that this suit is filed by the plaintiff as a civil action in equity, and is brought for the purpose of enjoining the enforcement of an Act of the General Assembly of the State of Indiana entitled, "An Act

[fol. 53] requiring licenses for the operation, maintenance opening or establishing of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the State Board of Tax Commissioners in connection therewith and prescribing penalties for the violation thereof," which act was known as Enrolled House Bill 197 and also as Chapter 207 of the Acts of the Indiana General Assembly for the year 1929.

V

The defendants further admit that the plaintiff herein is now and for several years heretofore has been engaged in the business of selling groceries, fresh vegetables and meats, but defendants do not know the exact length of time said plaintiff has been engaged in said business or whether at wholesale or retail, or both. Defendants further admit that said business has been conducted by the plaintiff herein in the name of "Standard Grocery Company" and is now being so conducted by this plaintiff as an individual. That defendants do not know whether said plaintiff, as such an individual, owns the merchandise, groceries, vegetables and meats so handled in said stores known as the "Standard Grocery Company" or whether said articles are owned by this plaintiff jointly or in co-partnership with another person or persons or whether or not the buildings and structures in which said stores are operated are owned by said plaintiff or leased by him. Defendants deny that in the course of such business the plaintiff is engaged in interstate commerce, but admit that a portion of the merchandise used by plaintiff is bought in other states and shipped into Indiana, but as to the amount so shipped, defendants say they do not know.

Defendants further admit that at the date of the enactment of said statute the plaintiff was, and now is the operator of a large number of stores in the City of Indianapolis, Indiana, all operated and maintained by the plaintiff at sep-[fol. 54] arate locations in said City of Indianapolis under one management and control, but defendants do not know the method of financing or superintending of said business or the exact number of said stores which are operated by said plaintiff in the chain of stores so operated, or the location of said stores in said City of Indianapolis, Indiana.

Defendants do not know the amount of money invested by this plaintiff in said business, either now or during the ten years immediately preceding April 19, 1929, nor do defendants know the amount of the annual sales during said time through said stores, but deny said sales have been equal each year.

Defendants deny that there are a large number of individuals, co-partnerships and corporations engaged in business in the State of Indiana who operate and own a single mercantile establishment in this state similar to and conducted as the plaintiff conducts and operates his stores, who are doing a substantially larger volume of business than is done by the plaintiff in any one of his stores, or that do as much business in one store similar to plaintiff's stores as this plaintiff does in all his stores put together, but defendants allege that the stores operated by the plaintiff are similar to and conducted very much like all other chain store systems in the State of Indiana, as well as all individual stores not a part of such a chain of stores, but operated in a similar way and doing a similar business, in so far as the annual operation of said stores is concerned.

Defendants further deny that the plaintiff carries on the business of operating his chain of stores exactly as a single store is operated when owned by either an individual, co-partnership, or corporation, except as to the sole difference of the number of stores so owned or operated or the arithmetical ratio of stores so owned and operated. Defendants assert that by reason of multiple ownership of stores this [fol. 55] plaintiff, and all persons similarly situated, are able to increase their profit in each store so operated in ways and means not available to the operator of a single store operated in a manual way similar to the stores of this plaintiff, in that this plaintiff can and does shift slow moving merchandise from one store in his chain of stores to the store in the plaintiff's chain of stores affording the best outlet for said merchandise, that because of operating a chain of stores under one management this plaintiff and all persons owning and operating a chain of stores, are able to and do purchase larger quantities of merchandise and at a smaller cost per article than can or does the owner and operator of a single store purchase the same articles.

Defendants further allege that the stores operated by plaintiff, and any single ownership and management of a

chain of stores, enable this plaintiff and all such chain store systems so operated to serve a larger portion of the public in any given community than can any one individual store similarly operated and managed, serve at any one location in said community.

Defendants admit the ownership of more than one store or chain of stores by one person does not increase the fire hazard, require additional or increased police protection, or injure the health and morals of the community except in an arithmetical ratio, but defendants deny that these are the only means of measuring the extent of the police power of the State of Indiana, and say that the operation of a chain of stores under one management, ownership and control does affect the public welfare of the people of the State of Indiana, and that the protection and welfare of the people of Indiana is within the exercise of the police power of the State of Indiana; that said chain system of operation tends towards monopoly of the retailing of the food stuffs and all necessities of life within the State of Indiana and so affect the public welfare, and that the aforesaid Act of the Gen- [fol. 56] eral Assembly of Indiana and the classification therein made is a legal and proper exercise of the police power, to prevent and curtail a practice conceived to be promotive of monopoly with its attendant evils to the public and the State of Indiana, and that the exercise of said right is a legal, fair, just and reasonable exercise of said police power.

VI

Defendants admit there are more than 500 persons, firms, corporations, associations and co-partnerships, foreign and domestic, lawfully engaged in the operation of two or more stores for the sale of meats, groceries, vegetables, hardware, clothes, oil and other articles of merchandise in the State of Indiana who are in a like situation with this plaintiff; that the owners of said chain stores are too numerous to join in this action and that the plaintiff prosecutes this action on is own behalf and on behalf of all others individuals, firms, associations, co-partnerships and corporations who were on April 19, 1929, and still are engaged in the operation of two or more stores in the State of Indiana and for the purpose of enjoining the enforcement of said statutes enacted by the General Assembly of the State of

Indiana against this plaintiff and all such other individuals, firms, associations, co-partnerships and corporations owning or operating two or more stores in said State of Indiana; and that said question as to the validity of said statute is one of common and general interest to all of said classes of persons within the meaning of Equity Rule No. 38, and also to the general welfare of the people of the State of Indiana.

VII

Defendants further admit that the General Assembly of the State of Indiana for the year 1929 passed said Act on Monday, March 11th, 1929, and that said Act was duly [fol. 57] signed by the Governor on March 16, 1929, and that the copy of the act embraced in plaintiff's bill of complaint herein is a true and exact copy of said act.

Defendants deny that under and by virtue of the terms of said Act the plaintiff and every owner and operator of a store of any kind would be required to obtain a license from said defendant State Board of Tax Commissioners of the State of Indiana in order to operate their business and to pay the license filing fee of fifty cents for said license as provided in said act, but assert only such persons, co-partnerships or corporations as own, operate and control a store as defined in said Act are to procure such license. Defendants admit that the following annual license fees are fixed by Section 5 of said Act:

1. Upon one store, the annual license fee shall be three dollars for each such store;

2. Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store:

3. Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

4. Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

5. Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store.

The defendants admit that the plaintiff herein, pursuant to the provisions of said act, would be required to pay an annual license or occupation tax on such stores as he may operate, and a fee of twenty-five dollars on all stores over [fol. 58] twenty in number which he may now operate or may hereafter open, establish or maintain, but defendants do not know the total fee which would be required of the plaintiff under said act.

Defendants admit that Section 9 of said Act provides that any person violating the provisions of said Act, is guilty of a misdemeanor and shall be fined not less than $25.00, nor more than $100.00, and that every day that such violation shall continue shall constitute a separate and distinct offense.

Defendants further admit that said Act became effective July 1, 1929, except Section 11 of said Act which bears an emergency clause and has been effective since March 16, 1929, and provides for an appropriation of $2,000 of the general fund of the State of Indiana to enable the defendant, The State Board of Tax Commissioners of the State of Indiana to prepare for and administer said law before any license or filing fees have been collected and further provides that when said license and filing fees have been collected that the general fund of the state treasury shall be reimbursed to the extent of said expenditure. The defendant the State Board of Tax Commissioners further admits that it is preparing to administer and enforce said Act and unless restrained from so doing by this court, will administer and enforce said law and expend funds out of the general fund of the State for the enforcement of it, will require the plaintiff and all owners and operators of stores, as defined in said Act, in the State of Indiana to pay the license and filing fee prescribed in said Act, but deny that said defendants, or any of them, will upon the failure of any store owner, including the plaintiff, to make such application and pay such license fee as required by said Act, attempt to enforce against such store owner, including this plaintiff, the penalties provided in said Section 9 of said Act as the enforcement of said penalties under the misdemeanor provision of said Act lie not in any of these defendants, but as pro- [fol. 59] vided by law, any such prosecution would be insti-

tuted by the prosecuting attorneys, in the various judicial circuits throughout the State of Indiana either by approved affidavits or by grand jury indictment, approved by said prosecuting attorney. Defendant, State Board of Tax Commissioners, admits that it would endeavor to collect said tax on licenses provided for by said Act from this plaintiff and all other store owners similarly situated by virtue of the authority of said Act. Defendants admit that to enforce said Act would cause an irreparable injury and damage to this plaintiff and other similarly situated should said Act be by this court declared void, but defendants deny that said law is void, and allege it is a valid Act and its enforcement will not work an irreparable injury or damage to those affected by its provisions, but will be a means of raising substantial revenue of the school relief fund as well as the general fund of the State of Indiana and in a way and manner decided upon by the legislature of this State as a just and equitable means of so doing, and will not work as a discriminatory or unjust method of raising said revenue. Defendants deny that any funds of the State of Indiana have been thus far expended in the preparation for, or the enforcement of said Act.

VIII

The defendants admit said Act was included in the published Acts of the State of Indiana for the year 1929, and duly proclaimed by the Honorable Harry G. Leslie, Governor of this State as a valid statute on May 21, 1929, and that unless this court intervenes said Act did become effective July 1, 1929, except Section 11 of said Act which, by the terms of said Act, has been effective since its passage.

[fol. 60]

IX

The defendants deny said Act is unconstitutional, invalid and void, but assert said Act is valid, constitutional and a proper exercise by the legislature of the State of Indiana of its right to regulate means of raising revenue for the conduct of the general government of the State of Indiana and its school fund and regulate, through its police power, the retail and wholesale stores of this State, to discourage monopoly of the articles, food stuffs, and necessities of

life sold therein, and that said tax, regardless of said rights heretofore stated, is a valid revenue measure under both the State and Federal Constitutions, for the following reasons, towit:

First. Defendants deny said Act violates the provisions of the Fourteenth Amendment to the Constitution of the United States and deprives this plaintiff of his property without due process of law and the equal protection of the law, but assert said Act is in every way valid under said Fourteenth Amendment, and not an infringement of plaintiff's rights thereunder for the following reasons:

(a) Defendants admit said Act is, in part a tax measure, but defendants deny that it has nothing to do with the exercise of the police power of the State, and though defendants admit it has no immediate relation to the public health, public morals or public safety, defendants do deny it has no relation to the public welfare, but assert said Act is in fact a regulation to promote the public welfare, discourage monopoly of retail and wholesale trade generally throughout the State of Indiana and that the plaintiff's stores, and all stores similar thereto in method of operation and management as well as ownership, are affected with a public interest in that said stores are selling to the public generally the necessities of life, food stuffs, and articles generally used or consumed by the public. Defendants admit that said Act is not an inspection measure in which [fol. 61] fees are prescribed for the purpose of covering the cost of making such inspection, but defendants deny that said Act, as a tax measure, is not equal and uniform in its operation and that its classifications are oppressive or arbitrary and unreasonable, but say that said tax is equal and uniform on all persons, co-partnerships or corporations within any group or groups of said classifications in said Act and that said classifications are fair, reasonable and just and properly and fairly distributed both as to the volume of business done by, and the profits made through, the operation of said businesses and chain stores, as provided in said Act

(b) Defendants admit said tax amounts to $3.00 on the first store; $10.00 for two stores or more not to exceed five; $15.00 for each store in excess of five, but not exceed-

ing ten; $20.00 for each store in excess of ten, but not exceeding twenty, and $25.00 for each store in excess of twenty stores instead of twenty-five stores as alleged by plaintiff, but defendants deny that said classifications rest wholly upon the number of stores owned, operated, or maintained by any given individual, co-partnership or corporation and that they are arbitrary and unreasonable, but assert said classifications are reasonable, fair, just and lawful. Defendants further deny that said classifications have no relation to the amount of business actually transacted by such person, or corporation licensed, to their profits from said business, or to the number or amount of sales consummated in said business or any factor relating to the volume of business or amount of property used in the transaction of said business, but defendants assert and say that there is a reasonable relation between the number of stores in each chain of stores, as classified in said act, [fol. 62] and the profits to be derived by said person, co-partnership or corporation from the operation of said chain of stores, and that as each and every store is added to the store or stores theretofore operated by such person, co-partnership or corporation, there is an increase in profit at each of said stores theretofore operated, due to the increased purchasing power of said person or persons operating said chain of stores, all other factors and conditions being the same, and that the more stores that are added to the chain make an increase in the profits made in each of the stores theretofore owned and operated and that said tax is therefore fair, reasonable and just, having a direct relation to the volume of business and profits of said chain of stores so operated.

(c) Defendants deny that there is no basis for said classification in said Act and that it is unjust, oppressive, unreasonable, discriminatory or arbitrary, but allege said tax is just and reasonable and not oppressive and does not exact exhorbitant license fees from the stores of the State of Indiana and is not such a tax as will work a confiscation of property, or materially affect the business of this plaintiff or others similarly situated, and that said tax is proportionate to the volume of business and profits flowing from said business of the plaintiff and all persons, co-part-

nerships, or corporations similarly situated and doing a like or similar business.

(d) Defendants deny said Act is directed against persons owning and operating more than one individual store, but assert said Act provides for a tax on all stores within the provisions of said Act, including a license tax for a single store as well as chain stores, and further deny said Act is not predicated upon the volume of business or [fol. 63] amount of sales and therefore unreasonable, improper and unlawful, but assert said amount of sales or volume of business done are not the only measures of the legality of said tax.

(e) Defendants admit said Act provides penalties for the operation of a store or to continue to operate such store without first obtaining a license or permit and the payment of the filing fee as provided for in said Act and that said Act further provides for the imposition of a penalty for each day such failure to procure said license continues, but assert said penalties are just, fair, proper, reasonable and lawful, and are not drastic or excessive, but merely conducive to prompt compliance with its provisions.

(f) Defendants deny that said General Assembly of Indiana has no right to impose a license fee or tax upon stores or upon the right of said stores to continue to operate, except through and by the exercise of the police power, but defendants assert said General Assembly has a right to impose a license fee or tax upon any business, occupation or profession in the State of Indiana independent of the police power, and that said tax need not therefore deal with either the public welfare, its morals or safety.

Second. Defendants deny said Act violates or is an unwarranted abridgement of the rights and privileges guaranteed to the plaintiff under the Fourteenth Amendment to the Federal Constitution in any of the following particulars:

(a) Defendants deny said Act in its provisions is partial, unreasonable, arbitrary and unequal.

(b) Defendants deny said Act has a classification resting upon an unsound or unreasonable basis, and wholly

arbitrary.

(c) Defendants admit that said Act requires the plaintiff and other persons, co-partnerships and corporations engaged in a lawful business, viz: the operation of stores to [fol. 64] obtain a license as a condition precedent to continuing in said business, and further assert such a requirement is lawful both as an exercise of the police power and as a tax measure.

(d) Defendants admit the fees required by said Act are unequal in amount, and increase with the greater number of stores under one control or management, but defendants assert said classifications as provided in said Act are uniform and equal to all persons within its provisions whether said person, co-partnership or corporation operates but one or as many as 1,000,000 stores in the State of Indiana and that such a classification is not arbitrary, unjust or discriminatory as against the owners and operators of two or more stores in favor of the owner or operator of a single store, and assert said classification is equal as to all persons in the same classification or group and that said classification can reasonably be presumed to have been made by the legislature, and in fact is, based upon the increased profit derived from multiple ownership of chain operation of said stores and its increased volume of business transacted due to chain operation and ownership. Defendants further assert that should said classification be discriminatory, though not admitting it to be such, as against the owner of two or more stores, that such a discrimination as favoring individual ownership of stores with its attendant civic advantages and discouraging chain or multiple store ownership with its attendant civic disadvantages and tendency towards monopoly, is a question of legislative policy for the General Assembly of the State of Indiana to be determined by them, and which adopted policy is to be upheld unless there is no reasonable hypothesis upon which that policy can be based or predicated and is so palpably unreasonable and arbitrary as to admit of no conclusion by or through which it can be sustained, and defendants assert said Act has such a reasonable basis for classification as hereinbefore alleged.

[fol. 65] (e) Defendants deny, therefore, that said Act is unjust and unreasonably discriminating in that the basis of said tax is not fixed and determined by reference to the amount of business done, or to the amount of property employed in said business, but assert that a license fee or occupation tax is not a property tax as defined by law and though such a license tax may be predicated upon the volume of business or amount invested in said business, such a classification is not necessary to the validity of the statute; defendants further assert that the legislature is not bound to choose or put in effect the best possible method of determining how the tax shall be apportioned or classified and what classification to make, and that the wisdom of the legislation and the classification used therein, whether sound or unsound, will not invalidate said act unless, as heretofore stated, such act or classification used therein is so palpably arbitrary and unreasonable as to admit of no hypothesis upon which the legislature might have acted.

Third. Defendants deny said Act is invalid as violating section 23 of Article 1 of the Bill of Rights of the Constitution of Indiana which provides that:

"The General Assembly shall not grant to any citizen or class of citizens privileges and immunities which upon the same terms shall not equally belong to all citizens."

but assert said Act does not violate said provision for the following reasons, towit:

(a) Defendants deny said Act grants to the owners and operators of a single store privileges and immunities which it does not grant upon the same terms to the plaintiff and other owners and operators of more than one store.

[fol. 66] (b) Defendants deny the classification in said Act has no basis, is unjust, unreasonable, arbitrary, oppressive and discriminatory.

Fourth. Defendants deny said Act violates Section 1 of Article 10 of the Indiana Constitution, which is as follows:

"The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall

prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes as may be especially exempted by law,"

but assert said section is not violated for the following reasons:

(a) Though defendants admit that said Act is in part a tax measure, they deny said Act provides for a rate of assessment and taxation which is not uniform and which requires different people similarly situated to pay an unequal rate of assessment and taxation; or that because of the fact, if it be a fact, that this plaintiff owns 225 stores, this plaintiff will be required to pay a tax more than 1800 times as much as other individuals and corporations engaged in business in the City of Indianapolis, Marion County, Indiana, owning and operating a single store, but employing more capital than this plaintiff and having larger annual sales than this plaintiff.

(b) Defendants further assert that said section is applicable only to the taxation of real and personal property and not to license or occupation fees levied by the General Assembly of this State.

Defendants further deny that for any reason whatsoever stated in plaintiff's petition said Act is unconstitutional and void under the State or Federal Constitutions, but assert [fol. 67] and say said Act is in every particular and for the reasons hereinbefore set out wholly valid, both as an exercise of the police power and as a license fee or occupation tax.

X

Defendants admit that unless restrained after notice and hearing, these defendants will endeavor to enforce and collect said fees as provided for in said Act and should said Act be unconstitutional and the plaintiff herein and all others similarly situated were required to pay said tax, they would thereby sustain irreparable loss and injury for the following reasons:

(a) That the plaintiff and all others similarly situated would be compelled to pay taxes imposed pursuant to said Act for which they would not be legally liable if said Act is invalid and unconstitutional.

(b) Defendants, however, deny that upon the failure of said plaintiff and others similarly situated to pay said tax these defendants will attempt to enforce against this plaintiff and others similarly situated the rate of not less than $25.00 nor more than $100 per day for each day each owner refuses to comply with said Act, and that as a result thereof plaintiff and others similarly situated will be compelled to defend any criminal actions brought by either of these defendants, as neither of these defendants has authority to enforce said criminal provisions of said Act, but allege said right of instituting any such action lies within the power solely of the prosecuting attorneys of the various judicial circuits or grand juries within this State and not within the power of these defendants, or either of them.

(c) The defendant, The State Board of Tax Commissioners of the State of Indiana, admits it will expend public funds raised by taxation for the purpose of preparing to enforce said Act to the damage of plaintiff as a tax payer [fol. 68] of the State of Indiana if said Act is unconstitutional and void.

(d) Defendants admit that if this plaintiff and others similarly situated are required to pay said tax under protest and compelled to commence actions to recover the same, they would be put to expense for attorneys' fees and court costs and be required to bring a multiplicity of actions to recover said money, and that under the laws of the State of Indiana after having obtained a judgment for such claims, would be compelled to apply to the General Assembly of the State of Indiana for an appropriation for each of such claims before being able to obtain a return of the money so paid and could not be repaid unless the General Assembly, in its discretion, should make such appropriations, but defendants assert said tax will not be illegally paid for the reason said tax is legal, just, fair, and reasonable.

(e) Defendants deny that the enforcement of said Act against this plaintiff and others similarly situated will result in a substantial diminution in the value of the property employed by them respectively in their businesses, or that such a tax when paid will be large in amount and cannot be measured by any damages, but assert said tax is reasonable in amount and can be accurately and definitely measured.

(f) Defendants deny said Act is illegal or unconstitutional and that if enforced this plaintiff and others similarly situated will sustain a substantial decrease in the amount of annual business done by them respectively.

(g) Defendants deny that the enforcement of said Act will have the effect of injuring or impairing the lawful business in which this plaintiff and others similarly situated are engaged and deny that this plaintiff and others similarly situated have an undoubted right to engage in said business, which right is guaranteed by the State and Federal Constitutions, but assert said right is subject to a compliance with the provisions of said Act, and the pay-
[fols. 69 & 70] ment of the license fees therein provided.

Wherefore defendants pray that the temporary injunction issued herein be dissolved, that they be not enjoined or restrained from the enforcement of said Act of the General Assembly of the State of Indiana, duly enacted, proclaimed and published, but be permitted to enforce and collect the revenue, as provided for in said Act by the General Assembly of the State of Indiana, and for defendants' costs herein expended.

State Board of Tax Commissioners of the State of Indiana; William A. Hough, Pliny H. Wolford, and Philip Zoercher, as Members of State Board of Tax Commissioners of the State of Indiana; James M. Ogden, Attorney General of the State of Indiana, by James M. Ogden, Attorney General; Joseph W. Hutchinson, Deputy Attorney General; George W. Hufsmith, Deputy Attorney General; V. Ed Funk, Deputy Attorney General, Solicitors for Defendants.

[fol. 71] IN UNITED STATES DISTRICT COURT

In Equity. No. 1188

LAFAYETTE A. JACKSON, Plaintiff,

vs.

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA; William A. Hough, Pliny H. Wolford, and Philip Zoercher, as Members of the State Board of Tax Commissioners of the State of Indiana; James M. Ogden, Attorney General of the State of Indiana, Defendants

Before Sparks, Circuit Judge, and Baltzell and Slick, District Judges

OPINION—Filed February 1, 1930

BALTZELL, District Judge:

The bill of complaint in this case challenges the validity of an Act of the Indiana General Assembly, approved March 16, 1929. (Acts 1929, Chap. 207, page 693.) For convenience, this Act is set out in full in the footnote herein.*

[fol. 72] The bill alleges that plaintiff is engaged in the business of selling groceries, fresh vegetables and meats at wholesale and retail in the city of Indianapolis, State of Indiana; that he has been thus engaged for a period of more than ten years; that such business is conducted under the name of "Standard Grocery Company", but is owned

---

* "Enrolled Act No. 197, House

An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state board of tax commissioners in connection therewith, and prescribing penalties for the violation thereof.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That from and after the first day of July,

and operated by the above named plaintiff, LaFayette A. Jackson; that he is engaged in interstate comemrce in that a substantial portion of the merchandise used by him is purchased in other states and is shipped to him into the State of Indiana; that he owns and operates at this time two hundred and twenty-five stores, all situated in the city of Indianapolis, State of Indiana; that he has invested in such business a sum of money in excess of two hundred thousand dollars, and that his annual sales are in excess of one million dollars.

[fol. 73] The bill further alleges that more than five hundred persons, firms, corporations, associations and co-partnerships, foreign and domestic, are lawfully engaged in the operation of two or more stores in the State of Indiana, and that this case is prosecuted in behalf of all such persons, firms, etc. under Equity Rule No. 38.

The bill further alleges that the Act above referred to is unconstitutional, invalid and void, for each of the following reasons, to-wit:

First. That it violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of property without due process of law and denies to the plaintiff equal protection of the law.

1929, it shall be unlawful for any person, firm, corporation, association or co-partnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained a license so to do from the state board of tax commissioners, as hereinafter provided.

Section 2. Any person, firm, corporation, association or co-partnership desiring to operate, maintain, open or establish a store in this state shall apply to the state board of tax commissioners for a license so to do. The application for a license shall be made on a form which shall be prescribed and furnished by the state board of tax commissioners, and shall set forth the name of the owner, manager, trustee, lessee, receiver or other person desiring such license; the name of such store; the location, including the street number, of such store; and such other facts as the

Second. That it violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarranted abridgement of the rights and privileges guaranteed the plaintiff by such Amendment.

[fol. 74] Third. That it violates Section 23 of Article 1 of the Bill of Rights of the Constitution of the State of Indiana, which reads as follows:

"The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Burns' Revised Statutes, 1926, Section 75.

Fourth. That it violates Section 1 of Article X of the Constitution of the State of Indiana, which reads as follows:

"The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be expressly exempted by law."

Burns' Revised Statutes, 1926, Section 200.

The prayer is that the defendants be enjoined from enforcement of the provisions of such Act, and that it be declared unconstitutional and void, as in violation of both the

---

state board of tax commissioners may require. If the applicant desires to operate, maintain, open or establish more than one such store, he shall make a separate application for a license to operate, maintain, open or establish each such store, but the respective stores for which the applicant desires to secure licenses may all be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this Act.

Section 3. As soon as practicable after the receipt of any such application, the state board of tax commissioners shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If, upon examination, the state board of tax

Constitution of the United States and of the State of Indiana.

In accordance with Section 13, the Act in question, except Section 11 thereof, became effective under date of July 1, 1929. There being filed with the bill an application for an interlocutory injunction, a three-judge court was organized, as provided in Section 266 Judicial Code; United States Code Annotated, Title 28, Section 380. Under date of June [fol. 75] 28, 1929, an interlocutory injunction was issued by this court. A final hearing was had upon the bill under date of January 2, 1930.

The validity of the classification, as provided in Section 5 of the Act in question, fixing the license fees to be paid by plaintiff and other owners and operators of stores or mercantile establishments within the State of Indiana, presents the main question to be determined by this court. If it is determined that the classification contained in this section does not invade the constitutional rights of the plaintiff, and others similarly circumstanced, then it may be said that no other provisions of the Act invade such constitutional rights.

Authority is given the State to enact laws which may be enforced in the exercise of its police powers. The Act in

---

commissioners shall find that any such application is not in proper form and does not contain the necessary and requisite information, it shall return such application for correction. If an application is found to be satisfactory, and if the filing and license fees, as herein prescribed, shall have been paid the state board of tax commissioners shall issue to the applicant a license for each store for which application for a license shall have been made. Each licensee shall display the license so issued in a conspicuous place in the store for which license is issued.

Section 4. All licenses shall be so issued as to expire on the thirty-first day of December of each calendar year. On or before the first day of January of each year, every person, firm, corporation, association, or co-partnership having a license, shall apply to the state board of tax commissioners for a renewal license for the calendar year next ensuing. All applications for renewal licenses shall be made

question cannot be sustained, however, upon that theory. It does not relate to the public health, the public welfare, the public morals or the public safety. If sustained, it must be solely as a revenue measure.

Williams v. Standard Oil Co. 278 U. S. 235; 73 L. Ed. 141; 49 Sup Ct. 115.

Wingfield v. S. C. Tax Com. 147 S. C. 123; 147 S. E. 348.

The fact that the fee to be collected, as provided in Section 5 of the Act in question, is denominated a "license [fol. 76] fee", for the privilege of engaging in a legitimate business, is immaterial. It does not change or alter the situation. Such fees are considered revenue and are collected by virtue of the laws conferring upon the State the power to tax its citizens for the purpose of raising revenue to support its institutions and otherwise defray the expenses and pay the indebtedness of such State. The legislature may classify property and occupations for this purpose. It may even select some property or occupation for taxation and omit others, so long as such classification is reasonable and not arbitrary.

Quaker City Cab Co. v. Commonwealth of Penna., 277 U. S. 389; 72 L. Ed. 927; 48 Sup. Ct. 553.

Louisville Gas & Elec. Co. v. Coleman, Auditor, 277 U. S. 32; 72 L. Ed. 770; 48 Sup. Ct. 423.

Southern Ry. Co. v. Greene, 216 U. S. 400; 54 L. Ed. 536; 30 Sup. Ct. 287.

---

on forms which shall be prescribed and furnished by the state board of tax commissioners. No license shall lapse prior to the thirty-first day of January of the year next following the year for which such license was issued, and if, by such thirty-first day of January, an application for a renewal license has not been made, the state board of tax commissioners shall notify such delinquent license-holder thereof, by registered mail, and if application is not made for and a renewal license issued on or before the last day of February, next ensuing, the former license shall lapse and become null and void. Each such application for a renewal license shall be accompanied by a filing fee of fifty

No general rule can be laid down for determining the question of whether an Act is reasonable or is arbitrary. As has been stated in Bell's Gap R. R. Co. v. Penna. 134 U. S. 232; 33 L. Ed. 892; 10 Sup. Ct. 533:

"All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution. But clear and hostile discriminations against particular per- [fol. 77] sons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise."

See also Citizens' Telephone Co. of Grand Rapids v. Fuller, Auditor-General of The State of Michigan, 229 U. S. 322; 57 L. Ed. 1206; 33 Sup. Ct. 833.

It is not denied on the part of the plaintiff, but rather admitted, that the State has authority to classify occupations for the purpose of taxation, the contention of the plaintiff being that the classification contained in the Act in question is arbitrary, and that it deprives him of his constitutional rights. The law is firmly established that the power of classification is within the discretion of the legislature. The motives which may have actuated it in the enactment of such legislation do not concern the court. It may enact legislation so as to favor some industry or industries. It

---

cents, and by the license fee as prescribed in section 5 of this Act.

Section 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid

must, however, apply the same means and methods impartially to all persons of the same class, so that the law will operate equally and uniformly upon all persons under similar circumstances, and must rest upon some ground of difference having a fair and substantial relation to the [fol. 78] object of the legislation. It cannot arbitrarily select a certain class of persons for taxation and justify its acts by calling it classification.

Michigan Cent. R. R. Co. v. Powers, 201 U. S. 245; 50 L. Ed. 744; 26 Sup. Ct. 459.

Southwestern Oil Co v. Texas, 217 U. S. 114; 54 L. Ed. 688; 30 Sup. Ct. 496.

Gulf, Etc. Ry. Co. v. Ellis, 165 U. S. 150; 41 L. Ed. 666; 17 Sup. Ct. 255.

Cotting v. Kansas City Stock Yards Co. and The State of Kansas, 183 U. S. 79; 46 L. Ed. 92; 22 Sup. Ct. 30.

Southern Ry. Co. v. Greene, supra.

Quong Wing v. Kirkendall, Treas. of Lewis and Clark County, Mont. 223 U. S. 59; 56 L. Ed. 350; 32 Sup. Ct. 192.

Metropolis Theatre Co. v. City of Chicago, 228 U. S. 61; 57 L. Ed. 730; 33 Sup. Ct. 441.

The Act in question must be considered as enacted by the legislature solely as a revenue measure and may be denominated an occupational tax. Having thus concluded and

---

annually, and shall be in addition to the filing fees prescribed in sections 2 and 4 of this Act.

The license fees herein prescribed shall be as follows:

1. Upon one store, the annual license fee shall be three dollars for each such store;

2. Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

3. Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

having determined that the legislature has authority to classify occupations for the purpose of taxation, then, logically, the next question to be considered is whether the classification contained in such Act, for taxation purposes, is reasonable and will operate equally and uniformly upon all persons under similar circumstances, and rests upon some ground of difference having a fair and substantial relation to the object of the legislation, or whether such classification is arbitrary and deprives the plaintiff of his rights under the Constitution.

[fol. 79] The framers of the Constitution of the State of Indiana obviously had in mind the fair and equal treatment of all the citizens of such State with respect to the assessment and collection of taxes. The provisions contained in such Constitution and Bill of Rights would so indicate. The citizens of any State are amply protected against unfair and unequal treatment with respect to the assessment and collection of taxes by the Fourteenth Amendment to the Constitution of the United States. Undoubtedly the principle which later prompted the adoption of that Amendment was also in the minds of those who were responsible for the Constitution of the State of Indiana at the time such Constitution was written and adopted. The "equal protection" clause contained in such Amendment to the Federal Constitution, as applied to taxation, has been fully dis-
[fol. 80] cussed in the case of Louisville Gas & Electric Co. v. Coleman, Auditor, Supra, as follows:

"The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve

---

4. Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

5. Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store.

Section 6. Each and every license issued prior to the first day of July of any year shall be charged for at the full rate, and each and every license issued on or after the

the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, Kentucky Railroad Tax Cases, 115 U. S. 321, 337; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. * * * It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided, always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' * * * That is to say, mere difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis.' * * * Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

In considering the constitutionality of the Act in question, as was stated by the Supreme Court of the United States in the case of Quaker City Cab Co. v. Commonwealth of Penn-

---

first day of July of any year shall be charged for at one-half of the full rate, as prescribed in section 5 of this Act.

Section 7. The provisions of this Act shall be construed to apply to every person, firm, corporation, co-partnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section 8. The term 'store' as used in this Act shall be construed to mean and include any store or stores or any

sylvania, supra, the practical operation of such Act is to be regarded, and it is to be dealt with according to its effect. [fol. 81] It cannot be disputed that the amount of license fees, or, it may be termed taxes, to be paid by the plaintiff, pursuant to the Act in question, is determined, not by the amount of capital invested, the amount of sales, or the value of such business, but solely by the number of stores owned by him. Therefore, the classification under this Act relates solely to the number of stores owned by any person, firm, etc. The plaintiff owns and operates two hundred and twenty-five grocery stores, all located in the city of Indianapolis, State of Indiana, with a capital investment of approximately two hundred thousand dollars; the annual gross sales are in excess of one million dollars. Under the provisions of Section 5 of the Act in question, he will pay a total tax of $5,443.00 annually.

Under the evidence in this case, many persons, firms, etc., in the State of Indiana, owning but one store, having a much larger sum of money invested, having a much larger gross income per year, and doing a business similar to that of the plaintiff, will be required, under Section 5 of such Act, to pay a tax of only three dollars annually. The evidence also discloses the fact to be that other persons own a greater number of stores than the plaintiff, have a much larger sum of money invested, have a much larger gross income,

---

mercantile establishment or establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares, or merchandise of any kind, are sold, either at retail or wholesale.

Section 9. Any person, firm, corporation, co-partnership or association who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense.

Section 10. Any and all expenses incurred by the state board of tax commissioners in the administration of this Act shall be paid out of the funds accruing from the fees

and are engaged in a similar business, but have only one store located within the State of Indiana. Under this Act, such persons will be required to pay a tax of only three dollars annually.

Upon the final hearing, experts testified for both the plaintiff and the defendants. Their testimony was in detail and gave a general history of the origin and growth of what is commonly known as the "chain store". The Act in question is evidently intended to levy a heavier occupational tax upon the owners and operators of so-called "chain stores" than that levied upon the owners and opera- [fol. 82] tors of a single store. The evidence discloses the fact to be that there are, at the present time, approximately forty-four thousand retail stores within the State of Indiana, of which approximately eight per cent (8%) are members of a "chain." There are many owners of so-called "chain stores", who are engaged in the same general lines of business as the plaintiff, located in the city of Indianapolis, in the same neighborhood as that in which the plaintiff has a store, or stores, and are his active and aggressive competitors. The fact is, as shown by the evidence, that the competition between "chain store" operators is very active and aggressive.

---

imposed by and collected under the provisions of this Act. All money collected under the provisions of this Act, less the expenses incurred in the administration of this Act, shall be paid into the state treasury, monthly, by the state board of tax commissioners, and shall be added to and shall constitute a part of the general fund of the funds which shall accrue to the general fund during the fiscal year ending September 30, 1929, under the provisions of this Act, the sum of two hundred and fifty thousand dollars shall be transferred to the school relief fund by the auditor of state; and of the funds which accrue to the general fund under the provisions of this Act during the fiscal year ending September 30, 1930, the sum of five hundred and fifty thousand dollars, and during the fiscal year ending September 30, 1931, the sum of five hundred thousand dollars, and during each fiscal year thereafter the sum of three hundred thousand dollars shall be transferred to the school relief fund by the auditor of state. The transfer of such amount from

The theory of the defendants is that the owners and operators of more than one store do not have the same general interest in the community, do not encourage their employees to maintain permanent homes in the locality where their stores are situated, leave none of their money in such community, buy their goods at a lower price, and, in general, do not have the welfare of the community in which they operate at heart. They are, therefore, not as valuable to the general welfare of the community as the person who owns and operates a single store in such community, and therefore, belong to a different class, for occupational tax purposes, than the owner and operator of a single store. Some of the defendants' evidence supported that theory. While that may be true so far as some owners of more than one store is concerned, yet that is not the universal rule, and is not sufficient, within itself, to sustain the classification contained within the Act in question. The fact is, the plaintiff in this case is a resident and citizen, a property owner and a large taxpayer, in the city of Indianapolis—the city in which all of his stores are located. One owner of a single store may take more interest in civic affairs and contribute more to the general welfare of the community in which such store is located, than another owner of a single [fol. 83] store in the same community. This alone is not sufficient to place them in different classes for occupational tax purposes.

Statutes similar to the one in question have been enacted in other states. In the State of Kentucky, the legislature

---

the general fund to the school relief fund shall be made on the first day of January, 1930, and on the first day of January of each year thereafter, and no part of the money so transferred shall revert to the general fund at any time. The money so transferred shall be distributed in the same manner as the school relief fund is distributed, as provided by law, except that if any portion of such fund so transferred during any fiscal year is not needed in the regular school relief fund distribution, such excess may be used to apply on deficits existing from preceding years. The term 'School Relief Fund' as used in this section shall be construed to mean that portion of the common school fund set apart by Sec. 3, Chap. 201, of the Acts of the General As-

enacted a law which classified, for the purpose of taxation, cash and carry grocery stores on a different basis from those which extended credit to their customers. The Supreme Court of that State in City of Danville v. Quaker Maid, Inc., 278 S. W. 98; 43 A. L. R. 590, said in effect that "this difference in the detail of conducting the business affords no reasonable ground for classifying appellee on a basis for taxation purposes differing from that of the ordinary grocery store."

---

sembly of 1921 and which is therein designated as a 'relief fund'.

Section 11. The State Board of Tax Commissioners is hereby authorized to employ such clerical assistants as may be necessary to carry out and administer the provisions of this Act, and to prepare and print such blanks, forms, reports, receipts and any and all other things which may be necessary to provide for the administration of this Act, and to pay any and all such expenses so incurred out of the fund collected under the provisions of this Act. The sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the general fund of the state treasury not otherwise appropriated, to be available upon the taking effect of this section, and to be used by the state board of tax commissioners in defraying any expenses which may be incurred in the administration and in preparing to administer this act before sufficient funds shall have been collected from license fees, as hereinbefore provided. As soon as a sufficient amount of license fees shall have been collected under the provisions of this Act, the two thousand dollars hereby appropriated, or so much thereof as shall have been used, shall be returned to the general fund. Whereas an emergency exists for the immediate taking effect of this section, the same shall be in full force and effect from and after its passage.

Section 12. If any section, provision or clause of this Act should be declared invalid, such invalidity shall not be construed to effect the portions of the Act not so held invalid.

Section 13. This Act, except Section 11, shall be in effect from and after the first day of July, 1929."

In the State of North Carolina, the legislature enacted a statute exempting the owner of five stores or less, from taxation, under such statute, but providing that the owner of more than five stores must pay a tax upon all stores so owned by him. The amount of the tax to be paid by such owner depended solely upon the number of stores so owned. In many respects that law is similar to the Act in question in this case. The fact that all stores, under the Act in question, are taxed, does not alter the situation. The amount of taxes is based solely upon the number of stores owned, and the inequality is as apparent as though the first store was exempt. In the case of Great Atlantic & Pacific Tea Co., et al. v. Doughton, Com., 144 S. E. 701, the Supreme Court of the State of North Carolina held that the statute above referred to, taxing the owner of six or more stores, was in violation of the Constitution, both of that State and of the United States.

All persons engaged in the operation of one or more stores or mercantile establishments within the State of In- [fol. 84] diana belong to the same class, for occupational tax purposes, as plaintiff, and should pay the same license fee, regardless of the number of stores owned and operated by them. Any other classification is arbitrary and is in violation of the constitutional rights of the plaintiff. Many persons within the State of Indiana, who own but one store, handle the same line of goods as the plaintiff. In fact, many single store owners are his competitors. The mere fact that one such person reaches his trade by the establishment of more than one store located in various parts of a community, city, etc., does not place him in a different class, for occupational tax purposes, from the person who owns but one store and reaches his trade by means of delivery or requires it to call at his store for the merchandise handled by him. There is no real and substantial difference between such persons, within the law, granting to the legislature the authority to classify occupations for the purpose of taxation. The difference is simply in the detail in which such business is conducted, and does not create a different class. Such classification, if enforced, will deny the owner of more than one store of the equal protection of the law, as guaranteed by the Constitution of the United States, and will deprive him of his rights under the Constitution of the State of Indiana. Such classification is not reasonable,

and, as stated by the Supreme Court of the United States in Louisville Gas & Electric Co. v. Coleman, Auditor, supra, does not "rest upon a ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." It is arbitrary, and the Act in question is void and in violation of both the Constitution of the United States and of the State of Indiana.

A permanent injunction will be issued in accordance with this opinion.

[fol. 85] IN UNITED STATES DISTRICT COURT

FINAL DECREE—Febr. 15, 1930

Comes now the plaintiff in the above entitled cause by Samuel Ashby, Henry H. Hornbrook, Joseph J. Daniels and William H. Thompson, his solicitors, and come now the defendants by James M. Ogden, Attorney General of the State of Indiana, Joseph W. Hutchinson, George W. Hufsmith and V. Ed Funk, Deputy Attorney Generals of the State of Indiana, solicitors; and by agreement of parties James Showalter is substituted as a defendant for William A. Hough, and adopts the answer hereinbefore filed.

And this cause came on to be further heard at this term and was argued by counsel and thereupon upon consideration thereof it was ordered, adjudged and decreed by the court that said defendants, and each of them, their successors in office, their agents, servants, employes and attorneys be and they are hereby perpetually enjoined and restrained;

First. From enforcing or attempting to enforce in any way, directly or indirectly, against the plaintiff or any other store owner in the State of Indiana, being the persons, firms, corporations, associations or co-partnerships, either foreign or domestic, who operate, open, maintain or establish any store in the State of Indiana, any of the provisions of an Act of the Indiana General Assembly approved March 16, 1929, entitled:

"An act requiring licenses for the operation maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the dis- [fol. 86] position thereof, and the powers and duties of the State Board of Tax Commissioners in connection therewith, and prescribing penalties for the violation thereof."

which Act is Chapter 207 of the Acts of the Indiana General Assembly for the year 1929, (Acts 1929 page 693 et seq.)

Second. From enforcing or attempting to enforce against the plaintiff or any other store owner in the State of Indiana, described in Subdivision 1 hereof, any penalty or penalties for the failure on the part of the plaintiff or such store owner to apply for or obtain a license under said Act or to pay license fees thereunder.

Third. From instituting or maintaining any actions at law or suits in equity to recover from or of the plaintiff or such other store owners as described in Subdivision 1 hereof, any of the penalties provided for by said Act.

Fourth. From requiring plaintiff and other store owners in the State of Indiana as described in Subdivision 1 hereof, to file applications or obtain a license or licenses before continuing or as a condition to continuing the operation of their respective stores within the State of Indiana.

Fifth. From requiring the plaintiff or such other store owners, as described in Subdivision 1 hereof, to pay any filing or license fees under the provisions of said Act.

Sixth. That said Act of the Indiana General Assembly approved March 16th, 1929, which is Chapter 207 of the Acts of the Indiana General Assembly for the year 1929 and which is more particularly described in Subdivision First of this decree, is hereby adjudged to be invalid and void as violative of the Constitution of the State of Indiana and of the Constitution of the United States.

[fols. 87 & 88] It is further decreed that the defendants pay the costs of this suit taxed at $—.

All of which is finally ordered, adjudged and decreed by the Court.

[fol. 89] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE AND PROOF OF SERVICE OF NOTICE OF LODGMENT OF NARRATIVE OF EVIDENCE—Filed May 5, 1930

To Lafayette A. Jackson:

Please take notice that we have on this 5th day of May, 1930, lodged in the office of the Clerk of said Court, a written statement of the evidence in cause number 1188 in equity in said court in condensed form for use on appeal to the Supreme Court of the United States, in which said cause Lafayette A. Jackson is plaintiff and State Board of Tax Commissioners of the State of Indiana, James Showalter, Pliny H. Wolfard and Philip Zoercher, as members of State Board of Tax Commissioners of the State of Indiana, and James M. Ogden, Attorney General of the State of Indiana are defendants; and that at 9 o'clock A. M. on [fols. 90 & 91] the 15th day of May, 1930, or so soon thereafter as we can be heard, we shall present said statement to the Judge of said Court and ask that the same be approved, ordered filed and filed as a part of the record in said cause for purposes of appeal.

James M. Ogden, Attorney General; Connor D. Ross, Assistant Attorney General; Jsoeph W. Hutchinson, Deputy Attorney General; George W. Hufsmith, Deputy Attorney General; V. Ed. Funk, Deputy Attorney General, Solicitors for Defendants.

Service and receipt of a copy of the foregoing notice and of the statement of the evidence are hereby acknowledged this 5th day of May, 1930, at Indianapolis, Indiana.

Samuel Ashby, Smith, Remster, Hornbrook & Smith, Thompson, Rabb and Stevenson, Solicitors for Plaintiff.

[fol. 92] IN UNITED STATES DISTRICT COURT

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed May 7, 1930

PETITION FOR APPEAL

Considering themselves aggrieved by the decision of the District Court of the United States for the Southern District of Indiana (Indianapolis Division) in cause number 1188 in equity in said court, wherein Lafayette A. Jackson is the plaintiff and State Board of Tax Commissioners of the State of Indiana, James Showalter, Pliny H. Wolfard and Philip Zoercher, as members of State Board of Tax Commissioners of the State of Indiana, James M. Ogden, Attorney General of the State of Indiana are defendants, the said defendants therein hereby pray that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

[fol. 93] ASSIGNMENT OF ERRORS

And the said defendants (appellants) assign the following errors in the record and proceedings in the said case:

1. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in overruling the defendants' motion to dismiss the bill of complaint.

2. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in holding and deciding that the classification as contained in Section 5 of Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 is not reasonable and does not rest upon a ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

3. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in holding and deciding that under the evidence in the case

there are many persons and firms in Indiana doing a business similar to that of the plaintiff and having but one store with a much larger investment and a much larger gross income who under Section 5 of Chapter 207 of the Acts of the General Assembly of Indiana of 1929 will be required to pay only three dollars annually as against $5,443.00 annually required to be paid by the plaintiff on account of his two hundred and twenty five stores.

4. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in holding and deciding that all persons engaged in the operation of one or more stores or mercantile establishments [fol. 94] within the State of Indiana belong to the same class for occupation tax purposes as the plaintiff and should pay the same license fee regardless of the number of stores owned and operated by them and that any other classification is arbitrary and in violation of the constitutional rights of the plaintiff.

5. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in holding and deciding that there is no real and substantial difference within the law granting to the state legislature the authority to classify occupations for the purpose of taxation between the person who reaches his trade through the establishment of more than one store located in various parts of a community and operated under the same general management, supervision and control, and the person who owns but one store and reaches his trade by means of delivery or by requiring his trade to call at the one store so owned by him.

6. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in holding and deciding that a classification for the purpose of imposing an occupation tax upon the basis of number of stores operated under the same general management, supervision and control as provided in Section 5 of Chapter 207 of the Acts of the General Assembly of Indiana of 1929, if enforced, will deny the owner of more than one store of the equal protection of the law as guaranteed by the Constitution of the United States and will deprive him of his rights under the Constitution of the State of Indiana.

7. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in holding and deciding that Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 is void [fol. 95] and in violation of the Constitution of the United States and of the State of Indiana.

8. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its decree in granting and issuing the injunction herein.

Prayer for Reversal

For which errors the defendants (appellants) pray that the said decree of the District Court of the United States for the Southern District of Indiana (Indianapolis Division) dated February 14, 1930, in the above entitled cause be reversed and a judgment rendered in favor of the said defendants and for costs.

James M. Ogden, Attorney General; Connor D. Ross, Assistant Attorney General; Joseph W. Hutchinson, Deputy Attorney General; Geo. Hufsmith, Deputy Attorney General; V. Ed. Funk, Deputy Attorney General, Counsel for Appellants.

[fol. 96] In United States District Court

Order Granting Appeal—May 7, 1930

It is now here ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the District Court of the United States for the Southern District of Indiana (Indianapolis Division) in this cause, as provided by law, and it is further ordered that the clerk of the court appealed from shall prepare and certify a transcript of the record, proceedings and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within 30 days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $500.

And defendants now file their appeal bond in the sum of $500 with Maryland Casualty Company as surety thereon, which bond and surety are now approved.

[fols. 97-104] Bond on appeal for $500, approved and filed May 7, 1930, omitted in printing.

[fols. 105-107] Citation, in usual form, showing service on Lafayette A. Jackson, filed May 7, 1930, omitted in printing.

[fol. 108] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1188

LAFAYETTE A. JACKSON, Plaintiff,

vs.

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, James Showalter, Pliny H. Wolford, and Philip Zoercher, as Members of State Board of Tax Commissioners of the State of Indiana; James M. Ogden, Attorney General of the State of Indiana.

Statement of Evidence—Filed May 7, 1930

[fol. 109] TESTIMONY OF ROBERT W. LYONS

Direct examination:

Is Executive Secretary of National Chain Store Association; born at Bloomington, Indiana, and educated at Earlham College, the University of Chicago, Indiana University and Indiana Law School. First occupation was with Trade Expansion and Research Department of large Rubber Company as District Manager for two years commencing in 1915, was traveling salesman, district sales manager and eventually general sales manager for small rubber

company, was employed with the Inter-Related Furniture Company and practiced law for a period of three years, for last two years has devoted entire time to Chain Store problems. National Chain Store Association is an organization composed of approximately one hundred of the leading chain stores of the country, both large and small. Its function is that of research into fundamental problems of the Chain Store field, both economic and social, the protection of the legal interest of its members and development and dissemination of completer knowledge of fundamental economics of chain store operations.

I have made a study of the economics of retail distribution both from a theoretical and practical standpoint and have familiarized myself with the current facts and theories on that subject as completely as it is possible for a person to do who gives his entire time to that particular field.

Chain stores operate in many fields, such as food stores, clothing, women's ready to wear, boots and shoes, dry [fol. 110] goods, and many miscellaneous shops, such as auto supplies, men's haberdashery and practically every line of staple merchandise attractive to the purchasing public.

The best estimates indicate a million and a half retail stores operating in the United States of which less than one hundred and fifty thousand are operated by chain store groups. There are eight thousand chain store groups operating these one hundred and fifty thousand retail stores.

Approximately half of the development in the chain store in items sold is in food retailing. Sixty-five per cent of the retail outlets of the country handle food stuffs. There are upwards of four thousand chains engaged in the sale of food stuffs. Competition between the different chains engaged in the same lines of business is very intense and my position is such as to give me accurate information with respect to this fact.

There is no cooperation or confederation at all between these competitors looking toward monopoly and there is not any attempt toward the suppression of competition among them. The competition between the different food chains is very keen and aggressive.

Generally speaking, chain stores may be divided into two types or groups: One group is represented by "shopping

merchandise" and the other by "convenience merchandise." The "shopping merchandise" field is represented by such stores as the Woolworth and the Kresge which usually have one central store located in a downtown shopping district and sell goods which the economists describe as "shopping merchandise" for which the purchaser will go to a central area in order to buy. The other class, in- [fol. 111] cluding particularly food items, constitutes the "convenience merchandise" where the housewife demands a convenient location of the store, accessible in a neighborhood sense. With respect to "convenience" stores, the number of consumers always determines the number of stores which may profitably occupy a given geographical area.

I have studied the elements which go to make up successful merchandising and there are certain fundamentals which have been clearly classified by economists as follows:

"A store must be well located, must have ready access to consumers, and it is obvious that a store that is miles beyond the edge of the community, is not situated as favorably, as compared with a store that is in the center of the consuming public on all sides; that the store must be an attractive trading place its exterior and interior must make of it a happy trading place for the consumers; there must, also, inevitably be adequate stocks of goods and saleable merchandise, within the needs and requirements of the consuming public, and the competitive requirements and the element of service must be very carefully studied and properly balanced. Good management, which suggests a cooperation of all factors engaged in the operation of the store, must be present. Employes' relations with consumers must be carefully disciplined and trained. And finally, the prices must be fair.

I would say that these are the elementary essentials of a successful merchandising business, wherever that success [fol. 112] may be found."

None of these elements of successful merchandising are generically or fundamentally peculiar to chain store operations as distinct from the operations of a single store. A chain store can not be successful without all of these fundamentals nor can a unit store. Staple merchandise or-

narily characterizes the stock of a chain store and makes it popular. One store may elect to handle purely staple merchandise and another may elect to handle largely luxury items. This is a matter of selection which is open either to the chain store or the independent merchandiser. In both the luxury line and the staple line there are chain stores and unit stores, each carrying the same type of merchandise. There are no lines of merchandise whatever which can be purchased by the chain stores which cannot be purchased by the individual stores. There is no advantage in the selection and location of stores which is open to chain stores and not open to the single or unit store operator. All the studies which I have made, and they are fairly comprehensive, indicate that the chain store does not have an advantage over the unit store in that the chain store can and in current practice does remove slow moving merchandise in one store to some other store where it may be moved more quickly. Such a practice is prohibited by the successfully operated chain store except in isolated and extreme circumstances for several reasons, the most important of which is that the cost of doing that sort of a thing is prohibitive. The average stock of the average retail chain store in the food field is between one thousand and twelve hundred dollars worth of merchandise. Sixty per cent of this mer- [fol. 113] chandise consists of such staples as butter, sugar, flour, salt, eggs, bread, milk, potatoes and items which are consumed in every neighborhood. If forty per cent of this entire stock of Twelve Hundred Dollars is made up of commodities or specialties on which the merchandise buyers' judgment might go wrong, that would mean that the merchant had only a total of $480 of merchandise in which the slow moving merchandise might fall and it would work out in practice that if two per cent of that merchandise was so bad that it was becoming dead and unsaleable in a good location, the merchandise manager would be looking for a new position. Two per cent of that amount would be $9.60 and if the retail unit had a profit of twenty per cent on that, it automatically prohibits a sufficient total of profits to justify sending a truck to get it to say nothing of the fact that when merchandise is sold to the unit stores the original packages are destroyed and the physical act of reassembling such packages for transfer to another place is prohibitive, to say nothing of the matter of bookkeeping and

accounting problems which have to be provided for at the central location.

Such an operation is prohibitive. Every feature of the chain store operation protests against it.

A number of elements determine the price at which merchandise is bought, but there is a relation between quantity purchase and the price at which it is made, but this relation of quantity does not connect itself at all in any way to the character of the buyers as to whether they are carrying on their business in a single store or in a group store, but is inherent in the matter of quantity alone. There are a vast number of independent or unit stores doing a [fol. 114] business comparable with a single unit of the chain store. In the United States at the present time there are a larger number of retail outlets owned by unit operators which are grouped together in the so called voluntary chains operated in a cooperative way than the combined total of the retail outlets operated by the combined chain store companies. I am speaking now of the food field.

Perhaps the oldest and one of the most successful examples of such buying operations is the Frankfort Grocery Company of Philadelphia, Pennsylvania, which was established in 1888 prior to the existence of chain stores. This is a cooperative grouping of a number of retail merchants in that city. In this particular case, the retailers owned the wholesale establishment and all the earnings of the wholesale establishment are distributed in proportionate shares. The Independent Grocery Alliance with headquarters in Chicago, Illinois, operating successfully through all the middle western states, including Indiana and Illinois, is fairly well established and has more than 10,000 merchants in the food field identified with its cooperative buying program. A very comprehensive service is rendered by this cooperative association. When a retail merchant becomes a member of it, they go into his store and re-design his lay-out, require that the store be painted in a certain way, that a sign shall be placed upon the front of the store indicating membership in that association and thereby advertising the advantages of that membership.

A careful statistical analysis is made of the items of merchandise which he carries, and their relation to each other, and he is instructed as to the fundamental balance that

[fol. 115] should be maintained between various items of stock, which balances on stock are required to be kept up on a basis which gives him all the advantages of an organized, representative turn-over on a given capital invested. They further maintain a regular supervision over the operation of his store, and from time to time they provide him with posters and stickers, with special items, or items which you can buy to take advantage of a particularly attractive price, and they provide him with facilities for group advertising, in which many grocers cooperate, with the idea of advertising through the regular newspapers, or other publications. I understand that the features of which I have just spoken prevail to a certain extent right here in Indianapolis.

The chain store does not have an advantage over the unit store in that by the mere addition of a new unit or store to an existing group the volume of sales is increased more than arithmetically by the sales made by the new unit. The normal growth in such a case is theoretically in an arithmetical ratio, but practically it is not even this because of this limiting factor; when a new store is introduced into a given chain it is inevitable that its initial sales will not equal the standard of sales established and therefore when a new store is introduced after such a period of time as would be required for that store to speed its sales up to the point of being on the established standard, its entire tendency is to depart from the previously established average for the number of existing stores. Practically, the tendency of the introduction of new stores is to reduce rather than to augment the arithmetical ration of the increase. Increase in sales in a chain group may arise from [fol. 116] any number of causes utterly unrelated to the mere unit problem. We are facing at this time in the development of chain stores a movement in the direction of modifying the type of store. Where heretofore most food stores have operated without a meat, fresh fruit or vegetable department, the companies operating such stores are making an advance in the direction of adding additional departments to their present stores rather than adding new stores. Such stores which are up to date are able to include all these departments rather than to start new grocery lines. It may reasonably be that one unit of a given chain of stores may show a certain ratio of corresponding

sales to those owned by the same identical chain and yet upon examnation it will be found that the number of departments introduced was entirely confined to the larger stores and that each one represented twice the volume of merchandise which had been encompassed in the average of other existing stores. In recent years we have been passing through a period of continuous, constantly increasing pressure for sales of merchandise which has increased the volume in the individual stores irrespective of whether they were single stores or units in the Chain Store System. S. A. Kress Company is a large and very substantial operator in the so called chain store field. It had, in 1917, 144 stores; in 1918, 144; in 1919, 145; in 1920, 145; in 1921, 142 and in 1922, 145. This chain made a growth in number of stores from 1917 to 1922 of one store or something like two-thirds of one per cent in the number of its units. Its volume of sales in 1917 was $17,633,100 and in 1922 $30,646,-937 and there was a progressive increase in sales during all of the intervening five years. The net profits of the stores in 1917 were $1,465,460 and in 1922 $3,083,640. The sales had increased eighty per cent; the profits one hundred [fol. 117] per cent with the addition of one in the unit of stores. It is not true as a general principle of operation, although it may be true in isolated examples, that a larger profit is derived from all the stores through the addition of new units and that as the sales thereby increase the percentage of the profits increases and that for this reason the chain store has the advantage over the unit store in that respect. This proposition is not true taken by and large and the trend is in the opposite direction. Any large volume within a single unit tends to increase the margin of profit for the simple reason that if a merchandiser doubles his volume of sales he divides his rent by two. The full benefit of that type of increase is heard of most extensively in the field of unit operations and to some extent in the chain operation by reason of the increased problems of management. The major saving which is important in a single unit arises from the fact of having a single group of employes and the grouping of service relating to that unit. When it comes to adding an additional unit each unit takes on its own group of similar expenses. I have made a study illustrating the matter of per cent of profit to growth in volume of sales as applied to the following chain stores:

Kroger Grocery & Baking Company, the National Tea Company, the Waldorf System, Incorporated and the Childs Company (the latter two being restaurant chains), F. W. Woolworth Company, S. S. Kresge Company, J. C. Penny & Company, and the Walgreen Company. All of these chains do business in Indiana. The stock of all of them is listed on some stock exchange and their statistics are required to be published in more or less uniform form. These chains were selected because they were represntative of the [fol. 118] established practice and there was no attempt to select a group of companies which reflect any peculiar situation.

Exhibits A1 and A2 show the unit sales of the various companies above referred to for the years 1922 to 1928, both inclusive, the unit profits of these companies during each of those years, the percentage of profits to sales and in the case of the S. S. Kresge Company the increased number of stores for each year with the other data above referred to. Ex. A-1 and A-2 read as follows:

[fol. 119]

EXHIBIT No. A-1—Jan. 2, 1930

Walter N. Carpenter, Shorthand Reporter

	1922	1923	1924	1925	1926	1927	1928
F. W. Woolworth Co.:							
Net sales	167,319,265	193,447,010	215,501,187	239,032,946	253,645,124	272,754,045	287,318,719
Net profits	18,324,398	20,698,180	20,669,397	24,601,764	28,204,927	35,350,473	35,385,606
% profits to sales	10.95%	10.70%	9.59%	10.29%	11.12%	12.96%	12.32%
S. S. Kresge Company:							
Net sales	65,191,467	81,843,243	90,096,248	105,965,610	119,218,005	133,765,777	147,363,002
Net profits	6,616,417	9,493,988	10,114,163	11,809,260	12,504,442	13,977,065	15,642,853
% profit to sales	10.14%	11.60%	11.22%	11.15%	10.48%	10.41%	10.61%
Number of stores	214	234	257	306	367	435	506
% increase of stores	.....	9.3%	9.7%	19.6%	19.9%	18.5%	16.3%
% increase of sales	.....	25.5%	10.0%	17.6%	12.5%	12.1%	10.1%
% increase of profits	.....	43.4%	6.5%	16.7%	5.9%	11.7%	11.9%
J. C. Penney Co.:							
Net sales	49,035,729	62,188,970	74,261,343	91,062,616	115,683,023	151,957,865	176,698,989
Net profits	3,325,720	4,490,293	4,686,572	7,452,568	8,918,272	8,948,699	10,588,972
% profit to sales	6.79%	7.22%	6.31%	8.18%	7.70%	5.90%	5.98%
Walgreen Company:							
Net sales	.....	3,614,634	5,586,442	9,319,794	13,494,878	20,658,070	31,389,313
Net profits	.....	191,634	439,110	558,326	1,006,207	1,501,253	2,752,424
% profit to sales	.....	5.3%	7.9%	6%	7.5%	7.2%	8.7%

[fol. 120] EXHIBIT No. A-2—Jan. 2, 1930

Walter N. Carpenter, Shorthand Reporter

	1922	1923	1924	1925	1926	1927	1928
Kroger Grocery & Baking Co.:							
Net sales	53,753,563	74,339,108	90,124,798	116,235,437	146,009,373	161,261,354	207,372,551
Net profits	2,061,390	2,209,174	3,186,321	3,327,839	4,131,225	4,377,104	5,323,586
% profits to sales	3.83%	2.97%	3.54%	2.88%	2.83%	2.71%	2.59%
National Tea Co.:							
Net sales	20,632,332	31,292,239	39,058,830	47,450,885	53,667,785	58,801,376	85,881,696
Net profits	957,408	1,088,894	1,472,993	1,569,636	1,585,221	1,996,041	2,822,440
% profits to sales	4.63%	3.47%	3.77%	3.30%	2.95%	3.39%	3.28%
Waldorf System Inc.:							
Net sales	12,118,596	13,910,056	13,552,401	12,832,953	13,463,264	14,679,662	14,621,170
Net profits	1,167,108	1,150,543	1,103,010	1,035,852	1,066,363	1,024,290	981,947
% profits to sales	9.63%	8.27%	8.12%	8.07%	7.92%	6.98%	6.71%
Childs Co.:							
Net sales	21,846,046	23,784,618	25,066,712	25,625,394	27,412,851	31,016,969	28,581,109
Net profits	1,523,138	1,562,669	1,808,958	1,655,760	1,683,330	1,496,858	1,002,425
% profits to sales	6.97%	6.57%	7.21%	6.46%	6.14%	4.82%	3.50%

[fol. 121] These figures show progressively an increased volume of sales from year to year. Woolworth Company is the largest of these so called chain stores and is a Fve and Ten Cent Store chain. Its volume of business in 1922 was $67,319,265, but had grown in 1928 to $287,328,719.

The witness detailed certain of the figures which are set out in the above mentioned exhibits. The F. W. Woolworth Company, in the year 1927 and 1928 adopted a new accounting system in which they included earnings from their foreign subsidiaries amounting to $4,000,000 which were not included in any of the previous years and the figures for these two years should be qualified because of this fact in any comparison with the figures for the previous years. If the development of the domestic sales alone of this company is considered, the earnings would have declined in 1927 to 8.9 per cent. The principle is the same for 1928 when the percentage of profits to sales would be less than ten per cent if the foreign business is excluded. The J. C. Penny Company have greatly increased their number of unit stores, but I am unable to give the exact figures. The Walgreen Company is a drug store chain. The Kroger Grocery & Baking Company is one of the larger food units, being second in size only to the Atlantic & Pacific Tea Company. The latter company does not make public its operating figures and the same are not available. The National Tea Company is a chain in the food distributing business. The Waldorf is a system of chain restaurants as is also the Childs Company, and neither of them operate in Indiana. The Kresge chain is the second in size of the novelty chains and operates in Indiana. The information with respect to [fol. 122] it is more complete than with respect to the other units. I am familiar with the manner in which department stores are operated and particularly with some of the larger department stores in Indianapolis, including L. S. Ayres & Company, William H. Block & Company and H. P. Wasson & Company. These three stores are single unit stores, but with a diversified or broad line of merchandise. L. S. Ayres & Company operates 124 separate departments in its store and William H. Block & Company 86 separate departments, Each of these individual departments carries on a like business in competition with unit stores dealing solely in the

line which that department carries. They constitute, in fact, a number of competitive elements to the owners of unit merchandise stores. They have departments devoted to jewelry which competes successfully with the established retail jeweler; a department devoted to furniture which competes successfully with the established furniture outlets. The same is true of shoes and other lines in other departments. L. S. Ayres & Company departmentalizes a little more closely. For instance, the women's wear may be divided into misses, juniors and ladies' department and to that extent these three classes of merchandise ought to be regarded as one department rather than three. There are chain stores in the United States having but a single unit of their chain in the State of Indiana. The following are examples: American Writing Machine Company of Newark, New Jersey, with a total of 35 stores; the National Shoe Shops, Incorporated, with 72 stores; the Lerner Shops with 145 stores and A. G. Spaulding Company with 54 stores. Each operates one store in Indiana. The total number of retail stores (exclusive of galsoline filling stations) in the State of Indiana, according to the report of the Curtis Pub- [fol. 123] lishing Company in its trade analysis for 1929, is 44027 stores. The total number of chain grocery stores in Indiana is 1594. The number of grocery stores not in the chains is 8486. In drug stores, those independently operated in Indiana number 1094 as against 99 chain drug stores. The mortality of the number of unit stores is large and began when unit stores began. The evidence indicates that the rate of mortality or failures has not varied more than a fraction of one per cent during the past five years. There is nothing in the chain store idea or in the economics of chain store operations which makes them immune to financial disaster. There have been a substantial number of failures in the chain store group. One of the features of the chain store is the cash and carry business which means that a store sells upon a cash basis and makes no delivery of merchandise. The result of this practice is that it cuts out costs which may have been theretofore bound up in delivery and the extension of credit. This has an effect upon the ability of the store to sell at a lower price to the public. The method of selling on the cash and carry basis is not peculiar to chain stores, but is quite extensively practiced by independent grocery

stores. On the other hand, there are chain stores which practice the credit system in women's ready to wear, in men's clothing, automobile accessories, furniture and fixtures. There are approximately 10,000 filling stations in the State of Indiana. Eighty per cent of that business is in the hands of five or six companies. These companies es-entially are engaged in manufacturing and selling their own products, although with some of them it is largely a bookkeeping proposition between themselves and their subsidiaries. The largest or the companies engaged in Indiana [fol. 124] owning gasoline filling stations are Standard Oil Company, The Sinclair Oil & Refining Company, the Gulf Oil Company, the National Refining Company, the Shell Company, and possibly, one or two others. Not over eight per cent of the retail outlets in Indiana are chain stores aside from gasoline filling stations.

Cross-examination:

The chain retail stores represent less than eight per cent of the total stores in Indiana. The total number of retail stores in Indiana is something over 44,000. These figures were obtained by the Curtis Publishing Company, but I did not help to compile them. The data was taken from Bradstreet and Dunn and complied by newspapers in each community. I think these figures fairly represent the total number of retail stores in the State of Indiana. The plaintiff in this case has 225 grocery stores in Indianapolis. He owns more stores than the Atlantic & Pacific Tea Company in Indianapolis. The Kroger Company has less than the A. & P. There are not more than 600 chain grocery stores in Indianapolis which would be nearly half of the total number of chain grocery stores in the State. I am not familiar with the number of chain stores in Gary, South Bend, or in any other metropolitan areas in Indiana or in the smaller cities in Indiana. There are 1594 chain grocery stores in Indiana and 8486 independent grocers. This data is complied by the Curtis Publishing Company as above stated. There is no government survey of the situation except in eleven cities, which survey was made late in 1927 by the United States Department of Commerce and did not include any Indiana cities. This government survey showed that on the average about forty-four per cent of food stuffs

were sold through chains and that in some instances more than fifty per cent of the food stuffs in certain cities [fol. 125] were retailed through chains. This survey would show an increase in the total sales and the percentage of trade increasing in chain store sales. The rate of increase would be three per cent. Multi-ownership of grocery stores commenced in the United States in the latter half of the last century. The Atlantic & Pacific Tea Company was founded not many years after the civil war, although at that time it was hardly comparable with the present day chain system of food distribution. It began in 1890 to emerge into something resembling our present retail system. Multi ownership of stores started back in Europe in the Fourteenth Century. The chain grocery business has been handled for about thirty years as it is handled today. All merchandising, including the grocery line, has undergone complete changes in the last fifty to eighty years. There have been failures in the chain grocery line in both the larger and smaller groups and some of them were operating in Indiana. Lemer Brothers who operated ten stores in Indiana failed; the Court House Grocery Company operating eleven stores in Indianapolis went out of business within the last five years; the King Koffee Kompany, with twelve stores in Indianapolis; the Franklin Mills Company with seventeen stores; the Quaker Maid Company with fifteen stores; the Morgan Company with twelve stores and the Childs Stores Company with fourteen stores have failed. I received this information from the plaintiff plus my records. The Piggly Wiggly Corporation of the larger chains went out of busines four or five years ago through a receivership and reorganization. It was the result of the incompetency of its owner and stock speculation. This is the only specific record of a large failure. Its [fol. 126] business was purchased by the Kroger Grocery & Baking Company. Keen competition exists between the various chain units in all branches of chain merchandising. A cardinal principle is that the greatest service the merchant can perform for the public is to sell the public standard merchandise at the lowest possible price consistent with a fair margin of profit. Each chain store is competing against other chain stores in trying to give the best values at the lowest prices. Any issue of your daily news-

paper contains the competitive advertising of all these chain stores, each trying to under-sell the others. The chain stores generally, and particularly in the food line, adopt a practice of using leaders. A leader may be made up from any particular class of merchandise. It may be sugar, which was one of the first leaders known to the retail trade. The unit operator developed it. He found that by selling it at a very low price he could attract trade. The chain stores developed it still further. This week they may sell soap at a very low margin and next week they may sell canned peaches as a leader and so on. The chain stores sell below cost of operation only when competition outside of chain stores makes it necessary. The individual merchant follows this practice more generally than the chain store. The latest researches indicate that chain stores cut prices only when the local merchants or the unit operators make it necessary to cut prices to meet competition. I have observed this personally in many communities, particularly, in the community in which I live. Whether competition reaches the point that it detracts from the revenues of the various competitors and it is advisable to merge or consolidate depends upon the individual circumstances of each [fol. 127] case and no general rule can be set up. The Kroger Grocery & Baking Company have bought several chains that had operated in Indiana. The general attitude of the chain stores toward the civic advancement of the communities in which they operate is one of performing the greatest possible service for which a merchandising unit is designed and is not restricted to the business enterprise at all. In a chain store in a city of 5000 people a manager employed by the company and trained by it operates the store on a salary. His period of employment is the period of his competency and capacity and upon showing ability for advancement he is transferred from one location to another. In the J. C. Penny Company their business has developed rapidly and they have revised their plan so that each one of their store managers owns a percentage of the capital stock of J. C. Penny Company equal to the value of a one-third interest in the local store. I do not know about the employes of Montgomery-Ward or Sears Roebuck because they have only entered the chain store field within the last two years and their operations give as

yet no basis which to determine ratios. I do not know whether the men who opened their stores are still there. I think more of the employes who are running stores remain in the local stores than are shifted because of their showing of managerial ability. I am not familiar with their store at Plymouth, Indiana. It might be their practice to shift every three months or once a month and sometimes is. I know the policy of the chief chain store companies as to instructing their managers with reference to their attitude towards civic enterprises in their communities generally. They are instructed, in their respective communities, to [fol. 128] belong to the Chamber of Commerce, Commercial Clubs, Rotary Clubs and other civic organizations and do so belong. I am not familiar with that situation in Plymouth, Indiana. It is the policy of the chain stores, when a hospital is being built in a community to contribute but I am not familiar with that situation in Plymouth. It is the policy of certain chains dealing in food stuffs to buy under direct contracts and agreements with the canners of fruits and vegetables. Some of those purchases are made in California. I should be surprised if there were many who did not purchase California fruits. I believe the A. & P. purchased upwards of $150,000,000 in merchandise in 1929. They take the entire output of some packing companies and own some companies themselves. The A. & P. may have a size containing 8 or 5 slices of canned peaches just as the Woolworth Company has a tooth paste that sells for ten cents. Nearly all of the chains use the Del Monte brand of goods. The A. & P. have special requirements. I don't mean for their entire line. The general run of chain stores buy standard packs. A local merchant in a city of 5000 would have the ability through cooperative buying to purchase of any of these canners. If he deals individually he can get the same proposition that the chain operator gets in proportion to his capital. The more the demand upon the producer the more attractice price he makes to the purchaser, whether he is a chain operator or some individual. The larger the demand grows the more attractice the price within the limits of a reasonable profit to the producer. A man having 225 stores would be able to get a price corresponding with the quantity purchased. Theoretically, when you get a widening out of your busi-

[fol. 129] ness you find that there are always some unproductive circumstances connected with it although you find that the more efficiency you have in certain directions, both as to buying, prices and everything else, the more those circumstances are obviated. The A. & P. chain has its own warehouse in Indianapolis. In fact, several. The stores are classified by their requirements. At the end of every week a schedule of distribution is made up for each store. The articles are placed on a motor truck and delivered from a central point to the store. This is the usual practice of most chain grocery stores. As a theoretical proposition, if there was a particular article that did not have a ready turn-over in the particular community where the store is located you could run a delivery truck to that unit and unload certain merchandise and take a particular group of articles in that truck to another point for distribution where they would have a ready turn-over. That would not be bad business but would depend upon what would be the cost of removing these goods from one point to another. I have been in the employment of a chain store organization and in the active management of it. I know that the chain stores do not pursue a policy of shifting or moving merchandise from one point to another. The A. & P. stores do that in extremely isolated cases, but not in practice in operation. It would be possible for an independent merchant to do the same thing. L. S. Ayres & Company may move merchandise from one of its departments to its basement department. I know a grovery store that has many departments and they transfer goods from one department to another, but I do not mean by this that the individual merchant can remove goods from one store to another unless he owns it. I am familiar with the [fol. 130] operations of L. S. Ayres and Company. It is not a chain store. It has a central buying organization which has all the features of other central buying organizations and there are some fifteen or twenty stores in the country in this particular group located in the principal large cities of the country. The Great Atlantic & Pacific Tea Company of New Jersey is controlled through ownership of its entire capital stock by the A. & P. Tea Company. The stock ownership of that company is highly involved. The A. & P. Tea Company also owns the entire capital stock

of the Great Atlantic and Pacific Tea Company of Arizona; I believe, of the Great Atlantic & Pacific Tea Company, Ltd., possibly, the Great American Tea Company and the American Coffee Corporation and also the following companies: Atlantic Warehouses, Incorporated, White House Coffee Company, Incorporated, Yukon Club Company, the Nalcut Coffee Company and the Packers Supply Company. The Kroger Grocery & Baking Company is the second largest grocery chain in the United States, operating between 5500 and 6000 stores. It owns bakeries and warehouses located in the different principal cities throughout the United States and owns and controls packing houses. I do not know specifically the names of its subsidiaries. The Kroger Company acquired the Thrift Groceries, Incorporated, the Childs Grocery Company of Indianapolis, formerly having seventy stores, the Hoosier Stores of Fort Wayne, Indiana, operating seventy-three stores and the Foltz Grocery & Baking Company operating approximately ninety-three stores. These were acquired in approximately 1928. Kroger also acquired the Universal Grocery Company of Wisconsin, the Highland Baking Company and Piggly-Wiggly. The witness was uncertain as to whether this was the Piggly-Wiggly Company operating [fol. 131] in California or in Kentucky and Ohio. The Illinois States Company, with approximately one hundred and fifty stores, is now a part of the Kroger interests as is the Memphis Piggly-Wiggly Company with sixty stores; also Cox Stores, Incorporated, with a group of eighty-one stores. Kroger, in 1928, acquired the entire capital stock of the Consumers Sanitary Coffee and Grocery Stores operating three hundred stores in Chicago and the Piggly-Wiggly Corporation. The average number of different items stocked in the average grocery chain stores is between eight hundred and a thousand. The A. & P. stores have about 870 items. The average individual retailer carries nearer fifteen hundred. The Louisville Grocery survey conducted by the United States Department of Commerce disclosed the fact that the items in the unit grocery run, in Louisville, all the way from twelve hundred to three thousand twenty-one items. The average turn-over in a chain grocery store is between twelve and fourten times per year; sometimes, the average is higher than this and some-

times lower. Specific items show a variance altogether out of proportion to any average. The turn-over on coffee, sugar and items of that kind would be higher. The co-operative plan has made it possible for the individual merchant using that system to operate his business with as much profit as can be found in chain store operation. When a chain store purchaser goes to a manufacturer to purchase a particular commodity it is possible for him to obtain a price and get a reduction in the price of an article based on the fact that he can display that article in all the stores under the control of that particular purchaser, but this ability is not different from the opportunity of the inde- [fol. 132] pendent merchant through cooperative buying. The individual merchant in an independent group can assure the manufacturer that the result will be the same practically in his group as it would be in a chain group. There is an arrangement, but not a uniform requirement, between the purchaser for a cooperative unit which makes it mandatory upon the individual merchant to make an advertising display. All of the cooperative groups control the advertising display in the individual stores, this control varying in degree. The control is not mandatory in character or absolute in operation, but is controlled in theory and in conscious agreement between the two parties. The independent merchant is advised and in many cases it is demanded that he make such display. One of the oldest of such organizations in that field is the Frankfort Grocery Company of Philadelphia. When a man becomes a member of that organization he places his resignation in their hands to be accepted by the Board of Directors when he refuses to co-operate or violates the principles upon which he became a member. The most prominent of the cooperative buying concerns operating in Indiana is the Independent Grocers' Alliance. There are several hundred grocers stores in Indiana using that service. It is not mandatory upon them that they display goods as designated by the Association. I have no specific knowledge of any other cooperative system in a position of absolute control in Indiana, nor do I know of any other cooperative unit in Indiana in the grocery field of sufficient character to merit consideration. The purchaser for the Independent Grocers' Alliance, when he approaches a manufacturer, definitely assures him that the

display which the manufacturer may desire will be carried out in the individual retailing unit and he gets a price con- [fol. 133] cession based upon that assurance. I can not give you any specific instance of this, but I can give you specific surveys from the President of the Independent Grocers' Alliance supporting that fact. Under the cooperative plan, as distinguished from the chain store plan, generally the management of the store and its ownership remains in the party operating that unit, the independent merchant who has his own capital or stock.

"Q. Would you say, generally, that it is as easy, or not as easy, to get the cooperation of independent individuals in conformance to a certain policy, or plan—or is it easier to get employes of a certain unit, to follow out that plan?

A. There are two answers to that, which are parallel to each other. The first is that the independent merchant, who has his own capital, or stock, has a greater interest and a greater intelligence in applying sound suggestion given to him. The other is that with the class of help that is employed, necessarily, in a chain grocery store, is no substitute for judgment that the independent merchant, operating on his own capital, brings to his own business, even with the chain store operative's obedience to regulation."

As a general rule the employe does what he is told to do or he is fired. If the independent merchant does not see fit to follow the Independent Grocers' Alliance plan he is not fired, but his clerks are subject to the same regulations as the chain store clerks. The A. & P. stores use a system of [fol. 134] state-wide advertising to the extent that in the towns where they operate stores all over the state an advertisement may be inserted that on a certain designated day in the future a certain commodity will be offered only by the A. & P. at a certain fixed price. The Independent Grocers' Alliance follows that sort of a practice. My files would show five or six instances of that kind, but I do not have them with me. That advertisement would be for all of the localities where the Independent Grocers' Alliance had units and the advertisement would appear in the local papers. As a matter of fact the experience of the Independent Grocers' Alliance and of the chain stores and the experience of wholesalers has lead to the conclusion that

direct advertising in the newspapers is the most ineffecient form of advertising; that it shows the least satisfactory result and that the direct mailing of cards advising those with whom they are in contact is vastly more effective and produces more satisfactory results. This is a growing practice with all stores. Both methods of advertising are in vogue with both classes of stores. I know of a number of communities that are circularized with advertsing cards as often as twice a week. I do not live in Indiana and while I do not know positively, I know that this method is practiced all over the country, and it would be surprising to me if Indianapolis didn't do it. I think the chains rely more generally on newspaper advertising than on any other medium, but they are increasingly conscious of the inefficiency of it. I know nothing of the A. & P. figures with respect to its advertising program in Indiana during the past year. A concern operating fifty stores would pay the same rate for the same space as would an individual operating 225 stores. In the case of the Independent Grocers' [fol. 135] Alliance, operating in Indiana, if a merchant finds himself with a commodity that there is no demand for he can return that to his wholesaler generally speaking. The wholesalers accept the returned goods from their independent retailers in and out of the cooperative system. That is quite generally done and is practiced in Indiana. The goods are taken back at the same figure at which they were billed to the customer. It is merely an exchange and a credit. Goods are never shifted, so far as I know, from one cooperative unit to another cooperative unit. The goods go back to the central wholesale body. I don't know that they have any system whereby it can be handled otherwise. The Kress Stores is a Five and Ten Cent organization. Its profits in 1917 were $1,465,460; in 1922, its profits were $3,088,640. There was an increase of only one store during this period. The sales in 1917 were $17,633,000 and the total sales in 1922 were $30,646,937. I could compute the percentage of increase in the sales and profit, but I have not done so. I have made a very extended study of the S. S. Kresge Company more than of the others. The information for the others is available with one or two exceptions. The figure of the net sales of the Kresge Company in 1922 and the net profits are the figures given in the listing on the New York stock exchange. I figured the per-

centage of profits to sales by dividing the sales into the profits. There are several ways, when you are operating a store, in which to determine at the end of the year whether you have made or lost money. You might figure your net profit on the basis of the capital invested or upon the basis of the relation to the volume of sales, after which you subtract your cost of operation or doing business, but the gen-
[fol. 136] eral rule is to figure net profit on the basis of investment. There was a constant increase in the capital stock of all these companies as time went on. I could give figures later, but would have to check my records. The audit of the S. S. Kresge Company was prepared, undoubtedly, for the bankers rather than the company. I am not familiar with who the firm of accountants was. I compared defendants' Exhibit No. 1 with my Exhibit No. A-2 as to the net sales for the period shown in these respective exhibits. The items of net profit run rather uniformly except in 1925 there is a variance between the two exhibits of approximately one and a half million dollars in a figure of eleven million dollars and there is also a difference of one million four hundred thousand dollars in the 1923 figures. One set of figures is before taxes and the other is after and the other figures in the two exhibits are in conformity. My exhibit shows the number of stores operated by the Kresge Company in 1923 as 234 and that appears the same on defendants' exhibit No. 1 and on through, so far as Exhibit No. 1 goes, they are uniform with my figures. I am not familiar with the figures back of 1922 for the Kresge Company. My chart extends back to 1922 and defendants' Exhibit No. 1 back to 1909. I would be willing to acquaint myself with these figures, but I doubt whether they would be available within the time that is permitted here. I think figures made by Merrill-Lynch & Company are reliable, but that they interpret figures with a specific purpose in mind which is a banker's job, namely: to create and sell a corporation, and figures may be so interpreted that many of the statements which have a vital bearing are not considered, but they are of necessity based upon the facts. The percentage in the increase of a number of stores from 1909
[fol. 137] to 1927 was 935 per cent. The increase in sales for the same period 2515 per cent, and the increase in profits 5097 per cent, but this means nothing without knowing the development in the type of stores. In my Exhibit A-2 the

net profits for the Kresge Company are shown in 1922 to have been $6,616,417. These profits were figured by dividing the sales into profit. I arrived at that being the profit of the Kresge Company from its reports. That sum was arrived at after all the opening of the new units is charged as an operating expense and fundamentally would not show as a profit for that current year in all probability, but it is dependent on the individual company's method of accounting. I don't know specifically what Kresge's policy is. There are companies which operate both ways. I assume that it is the Kresge policy to open new units with profits from the units already existing, but specifically, I don't know. Some chain units operate that way and some operate on the method of purchasing units. The actual net profit might exceed the figure of $6,616,417 if they opened no new stores, at least theoretically it might. I know they did open new stores in 1922, but whether this figure represents the cost of doing that I don't know. I am not familiar with how individual companies treat that particular problem and unquestionably this might materially vary the outcome in my chart, depending upon the business policy in that regard. I am not familiar with the increase of chain stores in Indiana over the period of the last seven or eight years and I am not familiar with the number of independent cash and carry stores in the State of Indiana at this time or the total number of cash and carry chain operating stores in the State of Indiana or nationally. They are quite general figures, and the difficulty with them lies in [fol. 138] the fact that chain stores, which make it a general policy not to deliver under any circumstances, have found themselves, in local areas, faced with competitive problems purely, in which the local manager has a right to depend upon his own judgment and therefore will make deliveries in order to meet competitive conditions. This is a thing which is so bound up with local conditions that I doubt whether any company could tell you exactly what the figures are, of its own stores, in that matter, although we know, as a matter of policy, that chain stores meet all competition where it represents a service problem or where it is substantially tendered by the consumers. I could not arrive at any figure as to the cash and carry stores, whether they are chains or individually operated. I think the chain stores have developed the cash and carry principle very

largely and primarily chain stores do not extend credit. I do not know specifically of any chains operated in Indiana whch extend credit, but I feel sure that there are some who do. The J. C. Penny Company, which deals principally in dry goods and clothing, has a policy which militates against shifting goods from one unit to another. Instead of shifting any article they simply mark the article that is unsaleable down and sell it out. They were using this policy in 1927 and 1928 and if any merchandise was shifted between any one of the stores of Penny and Company to another it would be an exception rather than the rule.

Redirect examination:

In the opening of new stores those things which were expenses were charged to the expense account and every capital charge would be charged to the capital account. [fol. 139] The addition of the new store would not bring up arithmetically even the volume of sales until it had reached a point where it would equal the other units. A condition coming on during the war period, which has more or less continued since that time, has decreased the purchasing power of the dollar, or putting it in another way, has increased the sales price of some articles. In the compilation of figures where volume of sales or profits for the period prior to 1917 or 1918 as compared with the increase since that time, you will have to take account of that economic fact. The value of the dollar as compared to the pre-war values is about sixty-three cents. The average turnover in grocery chains is from twelve to fourteen turns, sometimes higher, sometimes lower. The Louisville survey gave particular attention to that matter and disclosed some things concerning the turn-over of individual stores. The figures compiled by the Department of Commerce in that survey show two examples, one of a store with an inventory of $3,500 doing a business of about $24,000 annually getting seven turns roughly speaking, and one of a competing merchant operating without cooperative buying with a $3,000 inventory, doing $115,000 annual business and getting 37 turns per year. The history of unit retailing and its effect on turn-over lies between these two points. Among individually operated stores a great many examples of turnover equal to or exceeding those of the chain group are

found. There are cooperative groups in the drug trade to a very great extent. It is as highly developed in relation to drug stores as in the grocery field. In the grocery trade it is developed to a very wide extent, national in scope, and the same thing is true of department stores. L. S. Ayres & Company is a member of a cooperative group, [fol. 140] but not in any sense the member of a chain. It is a wholly independent store participating in cooperative buying.

Recross-examination:

L. S. Ayres & Company owns stock in a cooperative buying concern. Good will does enter into the chain store business. The opening of a new unit in a community with other stores of the same type and character effects the business of the new unit, both good and bad. It is obvious that only a fraction of the total percentage of groceries is purchased from chain stores and the reason is obvious that many people prefer to trade elsewhere.

By putting in a new unit you bring certain people to it and keep certain people away from it. When a man moves from one community where he has been used to trading in a certain type of store he usually sticks to that same type in a new community to which he moves. If he has traded with a chain store the value of that chain store good will may follow him to the other community. This is spread by word of mouth from one patron to another prospective patron of either group. Chain stores buy various quantities of merchandise to fill the various demands. While I don't know specifically, I assume that if there is a call for canned corn with less corn and more fluid in it they purchase it. It is not true that the same cannery is producing two different kinds of products, one for the general store trade and the other for the chain store group. On the other hand, the manufacturer usually makes a high priced and a low priced product. But possibly the wholesaler buys the two qualities in order to meet the demand of purchasers of different classes of goods. Wholesalers demand that type of products quite as generally as chain stores and if they [fol. 141] do not demand them quite as generally it is because they not not good merchants in senging new conditions.

I am familiar with the retailing set-up of the chain store grocery group. Bulk sugar is delivered to the chain store retail unit in either boxes, barrels or sacks depending upon local requirements. Some chains bill it at retail cost and others at retail price. I think the A. & P. bills at retail price. The local man in the unit is supposed to account for that merchandise as billed to him, but not necessarily at the price billed him, but at the quantity. A hundred pound sack of sugar is billed to the retail unit at a one hundred pounds and so with a hundred pound sack of beans and rice.

Re-redirect examination:

Where there are two types of corn, one with a greater volume of solidity than the other they constitute two different grades of manufacturing and packing that are well established and known. They are sold on the basis of being of different types. The wholesaler buys them with that classification just as the chain store does and they are passed to the public as of different quality. There is no difference in the chain stores from the unit stores in that respect.

"Q. Respecting the question of good will—what is there in the way of a difference in good will in the individual store, as compared with that of the chain store?

A. There are many elements of good will with reference to the individual store, that are more extensive than in the chain store. The unit merchant has an opportunity to develop good will in many more ways than the chain operator has. To illustrate that: Your local unit retail store [fol. 142] can buy butter, eggs, fresh fruits and produce locally. The farmer comes in with several dozen eggs, and they are fresh and are immediately delivered. Oftentimes that grocery can buy this *this* produce and pay for it by merchandise, on which he has a profit, where the chain has to pay cash for it at its net cash market value. In an operation of that kind the retail grocer has an opportunity to build good will with the farmer, and this farmer, in turn, passes it on to the people whom he knows, and whose family and whose children he knows. The chain store manager can not be in an equivalent position.

Q. What would you say, as a conclusion, as to whether there is good will relating to the individual store?

A. A very definite good will.

Q. And as compared to that which exists in the chain store group?

A. I think, based upon unit per unit, it is a greater good will than that of the chain stores:"

Re-recross-examination:

That good will inures to the individual merchant, but so far as inuring to other individual merchants, there is very little of it in case people happen to move from one locality to another. In the same community it becomes an individual problem of the merchant as to the good will of individual stores, and so it is with two chain stores serving the same locality,—it depends upon the manager and his treatment of his trade.

[fol. 143] ROBERT W. LYONS, RECALLED

Direct examination:

The working hours in the highly organized chain stores are far below the total number of hours required of employes of independent units as indicated from experience for a period of thirty years. The average working hours in the chain store is less than those in the independent store. In the grocery field, particularly, managers of chain stores are largely recruited from the communities in which the stores are located—unavoidably so. In the other fields, in which the stores are larger than in the grocery field and the manager has a different type of background there are many reasons why the company might easily be in interested in having their manager own his own home. A special instance is that of the J. C. Penny Company, in which more than forty per cent of their managers do own their own homes and it will be remembered that at least half the stores have been established in the period of five years and therefore they have not had an opportunity to develop that practice. I know of no policy on the part of chain stores to discourage home ownership in any community.

Cross-examination:

If it was the practice of chain stores to shift its representatives at rather regular intervals it would be no more advisable for those representatives not to buy homes in the particular locality in which the store is located than in the case of the traveling salesman whose territory might be changed by the manufacturer for whom he works at any time. The policy of the company does not enter into the question of whether a manager would buy his home. I am not familiar with the A. & P. Company's policy or the Kro-
[fol. 144] ger policy in this respect. I have no way of knowing how many managers are home owners, but I would say that the percentage of Kroger managers owning their own homes is as great as any other class of employes earning similar wages and engaged in a similar service. Certain individual groups have a policy of getting their managers from a community in which their stores are located. I am not familiar with the policy of the A & P in this connection, but I am sure it is true of many of the chains. I know that in twenty stores adjacent to Richmond, Indiana, fourteen or fifteen of the boys that I knew when they were growing up are employed, and they grew up in that area. I haven't been in Richmond recently. Perhaps there are thirteen or fourteen working for the A & P group. There are one or two working for Kroger, but I do not know their names specifically.

[fol. 145] P. H. NYSTROM

Direct examination:

I am professor of marketing in Columbia University, having a bachelor's, master's and doctor's degree of the University of Wisconsin. My doctor's degree relates to the department of Political economy. Briefly, the history of my studies and work up to the present time is as follows: I entered the retail business in an independent, general merchandise store at the age of fifteen, in which business I continued until nearly twenty. I then began teaching in a country school and taught for two or three years and continued my education in high school and college. During the

intervening vacations I held various teaching positions and continued my business work generally in retail stores up to 1915, when I left educational work and became the director of market research for the U. S. Rubber Company for two years. In 1917 I was employed as sales manager of the International Magazine Company, a group of six magazines. I continued in that position for three years. Then I was appointed as director of the Retail Research Corporations and the Retail Merchandising Corporation, two different corporations of the same group, in which position I continued for six and a half years. In 1927 I severed my connection with that group and became professor of marketing in Columbia University. I also have a business connection on a part time basis with an organization that specializes in surveys and analyses of retail stores and their problems, with a view to helping solve them. I am the author of a book entitled, "Retail Selling and Store Management, 1914;" "Economics of Retailing, 1915;" "Economy of Consumption;" "Study of Consumers and What Consumers Want, 1929;" and a new work on "Economics of Retailing," to appear this month; various magazine articles on retailing, and other forms of distribution, including the sections on marketing in the Encyclopedia Britannica in the last three editions.

[fol. 146] The only connection which I have with the United States Bureau of Census, in connection with such matters is as counsel with the United States Bureau of Census, in connection with the new census of distribution, which is to be taken up this coming year. I am acting as counsel, however, on the retail census. During this time I have been keenly interested and have been trying to keep track of what is going on in retail distribution. I think I am a student of the theories of merchandising and their application to the fact. In connection with my work I have from time to time prepared compilations dealing with the distribution of retail trade by general merchandise lines in the United States and the distribution thereof as between different types of retail institutions which are responsible for that distribution. Exhibit B is my compilation for the year 1927 of the distribution of retail trade by merchandise lines and by various types of retail institutions. The total estimated distribution by retail is about $40,000,000. Grocery

merchandising is one of the major types and represents sixteen and a half billion dollars. Clothing of all kinds, including everything worn from head to foot, nine billion dollars; furniture one billion two hundred million dollars; house furnishings of all kinds one billion five hundred million dollars. The estimated amount distributed by department stores is six billion four hundred million dollars, or sixteen per cent of the total retail trade. The amount distributed by chain stores is estimated at four billion dollars, amounting to twelve per cent of the total retail trade. Mail-order houses are estimated to have distributed one billion six hundred million dollars, amounting to four per cent of the total retail trade. The other groups are company or indus- [fol. 147] trial stores, Consumers Co-operative Stores, house to house selling and independent stores. The independent stores are estimated to have distributed twenty-five billion two hundred million dollars, or a total of sixty-three per cent of the total retail trade.

Exhibit B is as follows:

EXHIBIT B

Estimated Distribution of Retail Trade by General Merchandise Line in 1927

Walter Carpenter

	Billion dollars
Food, including groceries, meat, fruits and vegetables, dairy products, etc. sold to consumers	16 5
Clothing, including ready-made apparel and piece goods for men, women and children, underwear, hats, hosiery, shoes, rubbers, etc.	9 0
Furniture	1 2
House furnishings, including floor coverings, draperies, curtains, kitchen hardware, utensils, china, glass, etc.	1 5
Automobiles, accessories, gasoline, tires, etc. for pleasure use only	4 5
Tobacco products	1 8
Beverages, soft drinks, etc.	1 0
Pianos	2
Radio and phonographs	4

	Billion dollars
Jewelry, watches, clocks and silverware	.4
Electrical goods for households	.2
Perfumes, cosmetics, etc	.5
Soaps, dentifrices	.3
Drugs, proprietary and patent medicines	.4
Books and magazines bought in retail stores	.1
Paints and varnishes	.2
Confectionery, chocolates, ice creams and chewing gum	.3
Agricultural implements	.3
Miscellaneous	1.2
Total	40.0

Estimated Distribution of Retail Trade by Types of Retail Institution in 1927

	Billions of dollars	Percentage total retail trade
Department stores, including general merchandise stores	6.4	16
Chain stores	4.0	12
Mail order houses, including about 1,200 concerns doing a mail order catalog business	1.6	4
Company stores—stores owned and operated by industrial concerns primarily for their employes. These are generally of the department store type	.8	2
Consumers' cooperative stores	.4	1
House to house selling, canvassing, peddling, etc.	.8	2
Independent stores not included in classifications given above	25.2	63
Total	40.0	100

[fol. 148] My work has been more particularly concerned with independent retail stores, particularly department stores, in the last ten years. My studies have been general. I have tried to keep myself informed upon the essential factors of good merchandising. As I see them, the first

factor is a suitable location; the second, is a type of building suitable for the purpose of carrying on retailing; the third, is a suitable place for storing and displaying merchandise and making it convenient for the transaction of retail business. Next, is an organization trained to carry on the functions of retailing. Next is a careful selection of merchandise, such as the customers of that store desire; next is an appropriate publicity to attract trade to the stores; next is an accounting for the purpose of determining whether the business is going ahead or falling behind, and in what particulars; next is proper prices, both as relates to competition and also to suit the needs of the people in the particular community. I think that covers the ground. Good management includes all of those. I do not see that any of these qualities have any relation to the manner in which a business is carried on, as to whether it is a single unit or a group of stores. I do not know of any quality that contributes to good merchandising which is available to chain stores that is not also available to unit stores. An attempt is made by all grocery stores to have that kind of thing which is wanted by most people, namely, the most stable types. The things which go to make up a stock of that kind are open to unit stores the same as chain stores. There will always be mistakes made by buyers. Those mistakes may be rectified in one of two ways,—by disposal of the goods or by cutting the prices down to a point where customers may be found who will take them, or by trying to get the concern that supplied them to take them back, whether they be a chain warehouse or a wholesale house supplying retail stores. I know in the chain store practice that unsalable goods are transferred from one unit to another, but I gather from all the information I have had from [fol. 149] among chain store executives, that it is looked down upon as poor business policy, and it is done to a less and less extent as efficiency in merchandising is raised. In the case of a unit store, the same problem is handled by getting the wholesale house to take back the goods that won't sell. This practice prevails to a very wide extent. The competition among wholesalers is very keen and in order to keep their retailers, they are, I might say, imposed upon very frequently by the retailer who sends back goods for credit that would not be taken back if there were a closer relationship between the wholesaler and the retailer.

I am familiar with the movement of co-operative buying on the part of a number of single units in this country. I have given study to that question both theoretically and practically. I was employed by a group, namely, the Retail Research Association, one object of which was cooperative buying. I was Director of that work. That group included seventeen department stores. There are now, I think, nineteen in the group extending from Boston to Los Angeles, in the principle cities of the country. The largest store in Indianapolis is a member of that group. The co-operative movement is a very live movement and is progressing over the country almost like a tidal wave. In a Wisconsin town which was my home town, a year ago one grocer out of eight was a member of the co-operative group. This last fall I visited that town and I found that seven of the grocers had become members of the group. I believe that to be typical of what is taking place throughout most of the United States. The American Institute of Food Distribution has just concluded a very thorough study of the extent of the co-operative movement among retail grocers. Their report early this past fall indicated that there are fifty-five thousand grocers who are members of such groups and more recently within the last month their report indicates that there are more than sixty thousand retail grocers in such group.

There are said to be about sixty-five thousand grocery units within the chains in this country. The point is made by the Amercian Institute of Food Distribution that the [fol. 150] number of co-operative independent grocers is now very nearly the same as the number of chain grocery units. The I. G. A., Clover Farms, Red and White, Flickinger's, Frankfort and a good many others are outstanding instances of co-operative buying in the grocery group. I do not know of any advantage in price growing out of quantity buying which is available to the chain store that is not also available to these co-operative groups. In addition to buying, additional service is rendered to members of the co-operative group by the co-operative organization. First, there is the exchange of information, making it possible for each member of the group to determine for himself on his own initiative what constitutes good merchandising, in all of these details that we mentioned before, as to expense,

advertising, personal and so on. In the second place, there are educational services generally issued from the headquarters of these institutions which are aimed to include the efficiency of the personnel of the stores. In some cases, the member stores are required to make these improvements. In other cases, they are not so required, but the general effect is to raise the standards of merchandising of the members of the group. As a result of the chain store upon the independent store, I think one may say that the chain store has displaced a good many independent stores, but the main effect of the coming of the chain store movement has been to induce independents very generally to become better merchants. We had a situation in this country fifteen years ago where the retailers had reached a sort of dead level and there is a large movement being made particularly by small retailers to improve in that respect. The chain store came along and upset the business of these independent retailers, and weakened them, and as a consequence, that slow process may have been painful to them, but the result has been very beneficial not only to the retailers, but to the public at large. Without doubt there has been a very general improvement in independent merchandising, and there are a very great many successful unit stores going on today. That is increasing by improved merchandising methods. I have made a study of the mortality of the indepehdent stores. I made my first study in 1912 or 1913. I will say [fol. 151] that there was practically no chain competition in these groups in the State of Wisconsin where I made the study, and the mortality rate found by Professor Montgomery in Buffalo and the mortality which I found in Wisconsin back in 1912 was approximately the same; both very high. There were many reasons for the high mortality rate. The most outstanding one was the lack of preparation in the fullest sense of that word—a lack of preparation of the people entering the business. There was lack of capital, lack of experience, lack of any ability to do this kind of work, a feeling that anybody could be a retailer. That is apparently more particularly true of the grovery field than of other fields. I feel sure that the buying advantage of chains, not only can be, but has been equaled by co-operative buying groups.

I have never found anything to indicate that by the addition of an additional unit to a chain, it will not only in-

crease the total volume of business done arithmetically to the extent of the number of units added, but it will operate also to stimulate in some way or other and increase the volume of business done by the pre-existing units of that chain. I do not know any facts which would result in an increase in the volume of the business of the preceding stores from the creation of the new unit. That is unreasonable. There might be an increase in the individual units, arising from several sources such as adding new lines of merchandise, new departments, and by more aggressive and better merchandising, by making intensive studies of consumers' demands, to find out what the people of the community desire and meeting that demand more directly by more aggressive publicity methods. All of those things would help to increase the business in any type of retail stores.

It is my impression that the volume of business done through independent retail stores has been fairly well maintained since 1920, but that the principal gain which corresponds to the gains in total retail sales have been in the newer types of retail institutions of which the chain units may be one. There are certain independent stores such [fol. 152] as department stores that have gone ahead very materially during the last ten years, and have increased in number of units. Assuming a given number of stores in a chain, with a given volume of business and profit, I do not think that the addition of a new unit or units to the chain as it then exists adds not only such profit as the new store might produce, but increases the profit of the pre-existing stores. If there is an increase, in my opinion it would be purely an arithmetically one based upon sales. There is competition between chain units engaged in the grocery line of business. It is very keen and aggressive. I know of nothing that indicates co-operation or confederation between different chains in order to avoid competition. I have not found anything in my study which indicates a tendency on the part of chain stores to develop into a monopoly in this country or to be inimical to the general public welfare. I have reached the conclusion that the coming of the chain store has resulted in a very decided advantage to the American public in lowering merchandise prices. Not that the chains continuously sell goods for less money than the in-

dependents do, because that is not true, but because of their competition, both sides are selling goods to the public for less money than the public would otherwise be provided with the goods. The movement has likewise been beneficial to the retail trade in improving the methods of distribution, in cutting expenses wherever possible, by improving the retail stores, by greater attention to having the right kinds of merchandise for the people who patronize the store, by reducing waste, through not having unwanted merchandise or having too much stock, by giving attention to the wishes of the consuming public, a system which did not exist prior to the coming of the chain store. In many communities retailers were quite callous and careless of consumers' wishes. There never was a time as I see it in this country when the consumer ruled so thoroughly as now and this I credit to the coming of the chain store.

The element of good-will varies very greatly from store to store. There are certain elements, however, in independent store management which seems to me to indicate that the in- [fol. 153] dependent store may build a more effective good-will than a chain store can, working under a hired manager. The independent store owner is a member of his community. He may have grown up there, but in any case he expects to make it his life-time residence in most cases. He knows the people of the community and they know him, and he takes into consideration individual wants on the part of his customers. I do not say that all independents do this, but some of them do all of that and do it very well. That is the type of individual personal service that is very essential toward helping on good-will. I would say that a well-conducted individual store has a better possibility of accumulating good-will than has the chain store. I am familiar with other movements in merchandising which, like the chain store, have more or less challenged public discussion and criticism with reference to their effect on the unit store. In the latter part of the '90's and about 1900, the department stores were becoming quite influential and powerful. At least that was when their influence on the public began to be discovered by the smaller stores, and there was a waive passed over the country; an effort to secure legislation and control in various other ways of the department store in the belief that it was dangerous, not only to the retailer, but to the public at large. About 1905, 1906 and 1907 that declined.

The second one occurred beginning perhaps about 1908 and continuing down to the opening of the European War. There was quite a wave of feeling of fear among small town retailers particularly concerning the development of the mail-order house trade, leading to efforts to secure legislation and regulation and leading to all sorts of demonstrations such as bon-fires and gatherings in middle-western communities. In the course of time the retailers found that they could compete with the mail-order houses and the mail-order house scare passed by. In 1921 another movement which frightened the retailers of the larger cities, as well as those of the smaller cities and including the department stores, was the house to house canvassing. That reached its peak about 1925 and now retailers generally feel that they can compete very successfully with that type of dis- [fol. 154] tribution. I consider all of these movements as simply the economic developments resulting from an attempt to develop successful merchandising methods. I would not be surprised if something would come up in the future that would take the place of the present interest in chain stores, giving the chain stores and the independents both something to think about.

Cross-examination of P. H. Nystrom:

There are advantages which inure to a large number of stores operated in one group. One of those advantages is quantity purchasing up to a certain limit. The number of stores may be advantageous in the exchange of information, but it is not the number so much as the quality of the members making up that group. It is difficult to state at what point in the number of stores, or better still in point of volume of sales, the maximum efficiency is reached in quantity buying. There is undoubtedly such a point. It may be fifty stores or it may be two hundred. I think it is somewhere around two hundred unit stores. After that you merely get a duplication of the same thing without any increase in efficiency. I have understood that the purchasing power of a grocery group of two hundred is the same as that of a thousand. I have understood this from chain stores themselves. I think it is very doubtful whether you get any advantage in quantity of purchases beyond one hundred fifty or two hundred stores. I am not familiar

with the purchase of canned milk in carload or fifty carload amounts to give anything more than an opinion, but I think there might be some advantage for the one buying in such a very large quantity as that. In other words, the nearer the output of the manufacturer that an individual buyer demands the more effective the price that he can get. If the element of competition in prices is wiped out and the articles purchased are the same and are sold at the same prices, I think it very doubtful whether the net profits of the group composed of two hundred stores would exceed the net profits composed of fifty units. I have been [fol. 155] studying costs of doing business in large and small concerns and I do not find that the larger concerns have lower costs of doing business than the smaller concerns. In some cases they are larger. I do not think I would want to go so far as to say that the costs in the larger concerns are generally greater, but I would like to make the statement that so far as my information is now available is concerned there is nothing to indicate that the larger concern has lower expenses. As to the purchase of the equipment for two hundred grocery units as compared with the purchase of equipment for five units, I am sure that the purchaser for two hundred stores would get a lower figure than the one purchasing for five stores, but I am not at all sure that there would be any difference as to fifty stores. A fifty store equipment is quite a big order. I would say it was very dangerous for a manufacturer to be tied upon an order that would keep him busy for a year, eliminating all his other markets. I do not happen to know anything about truck manufacturing, but my feeling is that probably the order that calls for deliveries throughout the entire year would get a more advantageous price than the one calling for deliveries for three months, but the difference might not be very considerable. The rank and file of employees in the fifty store group would be paid substantially the same wages as such employees in the two hundred store group, or rather there would be no reason because of the number of stores to pay the employees any different wages. There would likewise be substantially the same equipment in each store. Advertising and accounting also enter into the cost of doing business. The figures do not indicate that the cost of advertising per store for the fifty store group

is more than the cost per store of the two hundred store group. Usually the larger concern has the higher expenditure of advertising. It may be that they have more sales and it may be otherwise, depending upon how successfully the advertising is applied. Assuming a group of fifty and a group of two hundred stores, each desiring to run an advertisement of certain articles in the daily newspapers. Both will pay substantially the same amount for the advertising, but they both would not insert an equal quantity of space. The advantage that the larger group would receive [fol. 156] would be the benefit that they would get from the trading public coming into more units in the two hundred store group than they could in the fifty store group. The proportion of expense to sales does not diminish in actual expense figures. The result of cutting the amount of advertising would be a decrease in sales. I do not think that it can be answered categorically as to which of the two groups would receive the most benefits from the advertising. It there are two hundred neighborhood stores in one group and fifty in the other, it would not necessarily inure to the benefit of the two hundred group. There are single stores in large cities that get wonderful results, and then there may be two or five or fifty stores. I mean that there are single down-town groceries that advertise almost every day and get very fine results from their advertising. Theoretically as to advertising, there is an advantage in the group of two hundred stores over the group of fifty. But when I go back to my recollection of actual expense figures they do not seem to indicate that there is anything in it. Whenever a new store is put in there is a definite amount of advertising required to put it on its feet. It seems necessary to have a certain amount of advertising to keep each store going in a centrally managed advertising department operated for two hundred stores and they are likely to make more mistakes in putting out advertising than one who puts out advertising for fifty stores. Assuming the fifty store and the two hundred store group, there is an advantage in the two hundred store group because of its buying power in some lines, but in other lines there is no advantage. I would not say it is generally true that there is an advantage in the two hundred store unit.

I published what is known as "Chain Stores" by Paul H. Nystrom, revised in April, 1928, for the Chamber of Com-

merce of the United States, Washington, D. C. I do not think that I have changed my mind as to any item since writing that. I think there may be found items which would be advantageous for the larger groups and I find none as [fol. 157] to which the reverse is true. I mean that the advantages for fifty stores is practically the same on two hundred stores on most of the items, but on some that is not true. Assuming that the articles are sold at substantially the same prices in both groups, the net profit for any given period of the larger group as against the smaller would be greater to the extent of that difference; to the extent that their buying power gives them the advantage; and then there is this modification: that the rate of expense must be considered. I would not say that the average cost per store of operating expense is greater in the two hundred store group than in the fifty store group, but the evidence that I have seen indicates that it is fully as great with exception on both sides. The difference that would be enjoyed by the larger group of two hundred stores is in the items of larger sales which the smaller group would naturally purchase in smaller quantities. The larger items the fifty chain store group would be in a p*so*-tion to buy as economically as the larger chain. It depends on the amount purchased in all instances. There is a saturation point in the number of retail grocery stores that are patronized by the public in any given community and when that point is reached, anything over that would be foolhardy. I cannot answer, whether in 1925, we had a sufficient number of retail stores in the United States. The people were getting all the foodstuffs they needed. Some new stores are opening and some are closing and as the chain stores have grown up, they have replaced certain independent merchants: so that as the chain store group increases it necessarily passes a percentage of that saturation point,—partly that, and partly supplying the needs for additional food outlet and taking care of the additional consumers' demands. The retail trade in the small communities of this country have been declining for fully thirty years. They began to decline long before the chain store appeared in them. Chain stores have been operated in small rural communities for the past ten years. They were largely confined to the big cities and the chain store development

has more than doubled. It probably has quadrupled in the last ten years and the development in the small towns has come within the last ten years. The small retailers were passing out in the small country communities throughout [fol. 158] the United States during the entire period. I think perhaps the chief reason for that was the increase in the use of automobiles and the development of good roads, making it possible for people in those communities and in the country districts to go to other places farther and farther away. With this result noticeable now that the small community without a chain store is almost hopelessly lost. But the small community, with a chain store, offering big city trading conditions and prices keeps on being a trading center, not only for the chain store, but for other retailers as well; so that the trade of the small community is saved by the existence of the chain store. It is my belief, generally speaking, that the chain store in the smaller communities has stimulated business in these communities. I have seen more than half a dozen I. G. A. retailers during the last three years, but that fact is due to the fact that I live in a section of the country where the I. G. A. is not developed. This man that I spoke of last fall in River Falls, Wisconsin, expressed himself with almost religious zeal to the effect that he thought they had found the way out. I have talked with a great many who thought the contrary, but not I. G. A. people. Since the I. G. A. is not in that part of the country where I live, I know and see very frequently other grocers who are members of other buying associations and who are very enthusiastic and very firmly convinced that through those associations they have agreement by which they not only may continue to exist, but succeed in even check-mating the chain store competition. I have with me a copy of the article I wrote on chain stores revised in April, 1928. The following is a correct quotation from my work on the question of chain stores: "Up to 1927 chain stores had developed rapidly in the larger cities, Cleveland, Boston, Chicago, Los Angeles, Philadelphia, New York, and several other cities. More than half of all products sold through retail stores passed to the consumer through chain stores."

[fol. 159] A monopoly exists wherever a large part of the entire business in a given line is controlled or passed

through the units of one concern, one management. It must be through one controlled concern. I don't know what the amount of business must be to constitute a monopoly. Under the assumption that there is concerted unit control I should say that you had the controlling feature of a monopoly, if the concerted action of the number of groups could control the price of the thing that they were selling. I know of no such agreement between any of the chains. If such an agreement did exist, there would be a monopoly if it controlled the substantial part of the sales of certain commodities. In recent years there has been an increase in the amount of chain retailing and in certain lines there has been very decided increases. In foodstuffs over the last six years the chain grocery business has probably doubled and is still increasing and extending into the rural areas. The following is a correct statement from page 5 of my book: "In addition to the spread of most of the regular chain store systems into the smaller towns, several systems have grown up that cater especially to small town trade. It also begins to look as if the mail-order houses, would soon become important chain store factors. Sears, Roebuck & Company have appearently started out to establish a chain of department stores, most of which at the beginning of 1928 were located in the larger cities, but Montgomery, Ward & Company has commenced a plan of establishing unit stores mostly in medium and small sized towns. There has been a great development according to the statement made by the United States Department of Commerce in the leasing of retail stores since 1925 and 1926, subletting various classes of merchandise departments in the department and dry good stores, and other stores. This tendency has been most notable in department stores in cities of fifty thousand to one hundred thousand population and in comparatively large stores in other cities and specialty shops in the more populous cities. Accor-ing to the statement of the Department of Commerce it is probable that such leased departments exists in not less than thirty per cent of the department stores of the country and those departments are leased and continued by chain organizations known as syndicates.

[fol. 160] To the independent retailer a department store that is the progressive growth of chain stores, is naturally

becoming more and more a matter of serious consideration."

The difference between multiple store operation and individual store operation is one of ownership. The individual store has an individual owner, and the multiple store operation takes place with many stores with one central ownership. Usually the multiple ownership involves types of supervision and control of operation which are unnecessary in individually owned stores—officials and executives—new methods are established in quantity buying. If I speak of individual stores, individually owned stores without relationship to others, that constitutes a difference. In a multiple group or a chain store system there must be a high degree of supervision for every group of ten, or fifteen or twenty stores. There must be a local supervisor, who, in turn with other officials of that sort, are supervised by some other larger unit supervisor and he in turn must be supervised by someone above him. There is a whole string of supervisors and it is not just one set of supervisors, but there is a supervisor of store management. There may be an inventory supervisor; there may be an accounting supervisor; there may be a protection or detective supervisor; I cannot begin to enumerate all of them. They vary in different chains. I am not familiar with the person who dictates the policy of the A. and P. Store groups. The policy of the J. C. Penney Company is dictated by the President. They have many people in their employ who are expert along the line of business efficiency in retailing. Some of these get salaries of ten thousand dollars a year and have a stock ownership which brings their income up to fifty thousand dollars a year. On page eighteen of my book I make the statement: "When we come to buying, however, the chain stores naturally have a possible advantage over most independent stores because of their power to buy in large quantities." At the top of page 19 I make the following further statement: "The manufacturer with such large orders in his possession can in turn frequently secure raw material at a substantial reduction and further reduction from the cost of manufacture. The element of speculation [fol. 161] by the producer is largely eliminated." I think these statements are correct. On the bottom of the same

page I make the statement that: "In the grocery field I think there are prospects of a continued growth in chains for some time to come. This is in part due to the enormous assets." Taking the cooperative group and the management as compared with chain group management, it is not true that the cooperative groups have units operated by employees and all subject to the centralized head. I feel that the cooperative and the chain groups, however, have equal advantages. I think that cooperative groups work in such a way that it results in safety of action, and avoids some of the mistakes made by individuals who cannot be always right in their decisions when they act quickly. One of the strengths of the cooperative system is the tendency of human nature which leads a man to feel that as long as he owns and controls his own store that he is going to own and control it. On page twenty-five of my book I used this language: "The reason why such cooperative buying of the part of independent dealers does not grow faster are first, because with all the brokers and the agents the competition has not been general enough and keen enough to cause dealers to unite in self-defense. Second, most dealers are not possessed of sufficient experience in cooperative buying and selling beyond present provisions in any group in which he is an owner with his fellows. And thirdly, that it takes concerted efforts to get and keep a group together. The cooperative movement seems to grow only under necessity and then only as far as may be necessary. "That was my conclusion then and is my conclusion now. It was given as an address before the Chamber of Commerce in 1922, having for its purpose the awakening of independent retailers to the necessity for taking action to insure their continued existence and success in retail merchandising in this country, and the particular emphasis given to these points is due to that purpose. Most of the chain store groups now [fol. 162] instruct their local representatives to cooperate to the fullest extent in civic movements. To the best of my knowledge the A. and P. does this by instructing them to participate in local social movements. I don't know the A. & P. instructions in detail. I am repeating hearsay on A. & P. I never knew of the A. and P. Store heads instructing their employees to give any contributions to civic enterprises in a community. I never knew of the Kroger Com-

pany doing that. I don't know anything about their instructions. I think the attitude of the retailer towards the civic advancement of a community affects the advancement of a community in a civic way. The more he cooperates, the better civic community they have. And, generally speaking, the less he cooperates, the less civic advancement we have. I think I have studied all the available material in the line of the works of other writers on economics and this situation.

A. Generally speaking, yes.

Q. You have studied, I supose, all the available material in the line of the works of other writers on economics, and this situation, have you?

A. I think so, yes.

Q. Are you all of one mind and agreed?

A. No, sir.

Q. There are great minds differing on this, the same as on all other subjects—is that right?

A. Yes.

[fol. 163] TESTIMONY OF S. B. WALKER

I am controller of Wm. H. Block & Company located at the corner of Illinois and Market Streets, City of Indianapolis. Its entire business is conducted at that location. Its total business is more than eight million dollars per year.

Cross-examination of S. B. Walker:

Q. Do you consider your business similar to that of one of the Standard Groceries in the City of Indianapolis?

A. That would be a very broad question. It is a retail business. Otherwise I would not consider it similar.

Q. Otherwise than being a retail business there is nothing in common in either the management or operation, or or anything of that kind—is that correct?

A. No, you couldn't say there was nothing in common. Of course there are certain accounting practices that are similar.

Q. You don't sell groceries, do you?

A. No, we do not.

VICTOR C. KENDALL

Direct examination:

I am Secretary and Treasurer of L. S. Ayres and Company. It conducts a department store in the City of Indianapolis and its business is conducted from a single location. Its total volume of business is more than eight million dollars per year.

Cross-examination of Victor C. Kendall:

As to whether the business of L. S. Ayres and Company is substantially the same as that conducted by the Standard Grocery Company I would say that we do not sell groceries.

[fol. 164] LAWRENCE CARTER

Direct examination:

I am a certified public accountant. I have been engaged in that business in the City of Indianapolis for the six years last past, and immediately prior thereto was in the employment of the Public Service Commission of Indiana in the accounting field. Before that I was a bookkeeper in the employ of the Street Railway Company for five years and prior to that was with H. P. Wasson and Company in Indianapolis for about two and one half years. I have examined certain records and dates of L. A. Jackson, doing business under the name of Standard Grocery Company for the years 1922 to 1928, both inclusive. During the time of my investigation more than two hundred thousand dollars was invested in Mr. Jackson's business at all times, and his sales have always exceeded a million dollars a year. They have not equaled eight million dollars per year. Exhibit C shows the number of stores and the percent in ratio to the year 1922 for the stores, the sales and the profits using 1922 as a one hundred per cent or base. In 1922 he had sixty two stores. The sales and profits for that year as shown on Exhibit "C" are one hundred per cent. With that as a base the year 1923 showed ninety four stores or a ratio to 1922 of 151.70% for the stores, the sales ratio was 132% and the profits ratio was 123.25%. In the year 1924 there

were 110 stores or a ratio to 1922 of 177.42%. For the sales 182.33% is shown and for the profits 151.97%. In the year 1925, there were 148 stores showing a per cent ratio as to 1922 of 238.71%. For the sales the ratio was 241.34%. There were no profits, owing to a fire loss that year which *through* it into the red. The number of stores in 1926 was 186, showing a percent ratio as to 1922 of 300%. The profits were 213.54% and the sales were 242.80%. In the year 1927 there were 204 stores, showing a percent of ratio for 1922 of 329.04%. The sales ratio was 270.32% and the profits ratio was 208.11%. In 1928 there were 216 stores, showing a per cent ratio as to 1922 of 348.39%. The sales ratio was 305.59% and the profits were 252.30%. Exhibit "C" correctly reflects the information that I obtained from an examination of the record for those years. Exhibit "C" is as follows:

[fol. 165] EXHIBIT "C"

L. A. Jackson

(Standard Grocery Company)

Per Cent Ratio to 1922 for Stores, Sales, and Profits

	Number of stores	Per cent ratio to 1922		
		Stores	Sales	Profits
1922	62	100.00%	100.00%	100.00%
1923	94	151.70%	132.00%	123.25%
1924	110	177.42%	182.33%	141.97%
1925	148	238.71%	241.34%	Loss-Fire
1926	186	300.00%	242.80%	213.54%
1927	204	329.04%	270.32%	208.11%
1928	216	348.39%	305.59%	252.30%

[fol. 166] Cross-examination of Lawrence Carter:

I compiled this exhibit from the records of the L. A. Jackson Company covering the Standard Grocery Company in the office of Mr. Samuel Ashby. I did the work yesterday afternoon and last night. There were no books as we understand them in the way of ledgers. There were

cancelled checks in monthly bundles and bank statements. There were monthly summaries by years and the receipts and disbursements together with the summaries shown on the income tax return, copies of which were there together with the miscellaneous data used in compiling these figures. I did not make a complete audit. I satisfied myself that within reasonable limits they were correct, that is they had every appearance of having been carefully compiled. I made what we called spot checs and out of these things covering one or more months selected at random by me and checking the summaries on to the summary sheet and into the tax return. The percentages as set out under the heading of profits was the relation of the current year profit to the profits for the year 1922 and were calculated by dividing the 1922 profits into the profits for the current year. I arrived at the profit figures as shown on the copies of the income tax report covering that year for L. A. Jackson with respect to the business. To arrive at that profit, I used the sales less the cost of sales, giving the gross profits, with a further deduction for labor and miscellaneous expenses, state and county taxes but not federal income tax, depreciation on trucks and employe hire. I figured the percent of profits with respect to the profits for the year 1922. My percentage of profits as exhibited on the exhibit is found by dividing the gross sales by the profits for that particular year. I figured the percent of profits for 1922 with respect to the profits for the year 1923. I figured the number of dollars in net profit for each year but that is not on the exhibit. I have that in memorandum form. The percentage of profit is based by dividing the gross sales [fol. 167] by the profits to get the percentage for the year in the exhibit, that is, the relation of the gross sales to net profit. I figured the percentage of profit for each year based on the sales and I arrived at the percentage for 1928. 1928 is three tenths of one per cent less than 1922 and during the interim there had been those variation- one way or the other. The computation is made by dividing the profits by the gross sales in order to reflect a percentage. If the gross sales for the year were more than the capital invested the percentage of profit as per capital invested would increase. If the sales for the year exceeded the capital invested for that year there would be a corresponding increase on the percentage of the profit on the capital

invested. In other words, if a business has ten thousand dollars invested and it did twenty thousand dollars of business and the net profit is two thousand dollars, figured as against the sales you would divide the two thousand dollars by twenty thousand dollars and if you figured on the capital invested you would divide the two thousand dollars by twenty thousand dollars and if you figured on the capital invested you would divide the two thousand dollars by the ten thousand dollars, and the difference between capital and sales would govern the ratio of increase or decrease on percentage of profit. The exhibit shows that the percent of increase in sales in 1928 over 1927 was 35.27% based on the year 1922, as between the years 1927 and 1928, the profits show an increase of 44.19 of one per cent. I am not able to give the capital invested for the various years from 1922 to 1928 of the L. A. Jackson Standard Grocery Company, those figures were not available for this compilation, and it would be impossible at this time for me to give you the net profit in various years figured on capital invested. If the capital invested in 1923 was in excess of the sales for that year there would be a corresponding increase in the profit shown by my exhibit, if it was figured on the capital invested and the figures would be an entirely different set of percentages from the set shown in the right hand column, if it was so figured. I am not familiar with the average retail sales per week of the stores of Mr. Jackson; nor am I able to state the average investment in each store. He had no actual books that would show that figure that I know of.

[fol. 168] CHESTER H. JACKSON

Direct examination:

I am the son of Lafayette A. Jackson and am familiar with the condition of my father's business with reference to competition. We have always had keen competition from the very beginning. I would say we have had keen competition during all of the period from 1922 to 1928 and have been operating more stores trying to make a success of it and we have had to go after it harder to bring the sales up.

Cross-examination of Chester H. Jackson:

It is hard to say what years have shown a more keen competition than others. I would say that competition is getting keener all the time and has been every since 1922.

Direct examination of Lawrence Carter, recalled:

The following are the percent ratio of profits to sales for the years 1922 to 1928 inclusive:

1922—2%.
1923v—1.9%.
1924—1.6%.
1925—Showed a loss.
1926—1.8%.
1927—1.6%.
1928—1.7%.

Cross-examination of Lawrence Carter, recalled:

The records show that the loss during one year was due to a fire.

Thereupon the plaintiff rested.

Whereupon the defendants, to maintain the issues on their behalf, offered and introduced the following evidence, to wit:

WILLIAM A. RAWLS.

Direct examination:

[fol. 169] I am a teacher and the Dean of the School of Commerce and Finance of Indiana University. I have been connected with Indiana University since 1894 with the exception of two years during which I was studying at Cornell University and Columbia University. I hold a Bachelor's Degree and a Master's Degree from Indiana University and a Ph.D. Degree from Columbia University. I have made no original investigation of the problem presented by chain store operations but I have tried to keep up with the development in this particular field as a part of the general study of economics and business practices, which was one of the subjects under my supervision at the university.

I have made some study of the different methods used by chain stores in merchandising and in the general conduct of their business, and also have some knowledge of the operation of the individual store. I shall attempt to give the result of my observations and study as to what I have concluded to be the differences between the unit management and the multiple ownership and management by pointing out what seems to me to be the advantages of the chain store system. And I might say in the beginning that the originators of these chains seem to have had no advantage over the independent retail stores other than the originality and the initiative and courage and vision. They practically all so far as I am acquainted with them began in a small way with one or two stores.

[fol. 170] Now, the general policy in those days, I might say, was to finance new stores out of the funds derived from the old stores, and with the accumulation of experience and the development of skill in management, and with the acquisition of capital, they have come to have what I consider important advantages over the small, or the retail store—I will say, the average retail store, which is not supported and aided by cooperative effort.

I am now making a comparison, here, between the chain store and the average, or the ordinary retail store, which does not gain some benefit by cooperation with other stores.

Now, with those advantages which I give here, and which are interrelated and are inter-dependent, and I mean to give them in what might be considered the order of importance.

To begin with buying, because that is the first function in the process of distribution by retail:

Now, I have specified here, under buying, four points in which it seems to me the chain store has the advantage—(a) quantity buying. Quantity buying involves the application of the mass process to distribution, which would be comparable to the mass method that is used in production.

Now, this quantity buying, or mass buying, makes possible the obtaining of goods at lower costs. This does not necessarily mean that the manufacturer is intimidated to give this lower price. It means that mass distribution makes possible, for the manufacturer, mass production, which, in turn, lowers his unit costs and, therefore, it may

be mutually advantageous to the chain store and the manufacturer.

Now, this becomes possible because of the practice of the chain store to seek the source of supply—which is the producer.

(b) Under buying—the chain store usually buys for cash, which gives it the advantage of cash discount, which has been stated to be approximately two per cent of the cost of the goods.

[fol. 171] (c) Skill in buying. At the present time I believe that this is more important, even, than the advantage of mass buying. The chain store knows what it wants to buy, and how much it should buy, and where to buy. It has ascertained this information by a study of past records, and by research in other lines. It knows what the public wants and what the public is willing to pay. It studies the types of products which are suitable for its handling, their sizes and styles, their quality and what are the favorite. It also studies the seasonal, or cyclical fluctuations in business and adjusts its buying policies in view of such possible situations.

The general practice is to buy standard goods. Odd sizes, odd lots, and so on, are not suitable for handling by the chain stores.

Sometimes it makes experiments. If a new product is offered, instead of buying great quantities of it, it will experiment—a chain will experiment in one of its stores, or in a group of its stores, to see what the reaction of the public to that product is.

(d) It performs the function of warehousing. By going directly to the source of supply it eliminates the wholesaler and his functions, one of which is warehousing, or caring for the goods.

By having its own warehouse the chain can have very prompt and efficient service in supplying the needs of the respective stores at the time the goods are needed.

Now, this mass buying and warehousing requires an adequate supply of capital, and so the second advantage of the chain store is a large supply of capital.

Now, I stated that formerly the chain stores financed their expansions out of their earnings, or their profits, which they had made in the earlier stores that were established. It was necessary for them to do that, because

bankers and investors were skeptical of this new method of retailing, just as they were skeptical of the automobile in-
[fol. 172] dustry, when it first started. But now chain stores can get all the capital that is needed, by the sale of securities, either through bankers or investment houses, or directly to their own stockholders, or directly to the public.

Now, the advantages that come from the control of an abundant supply of capital are these:

The chain can make its expansions as desired, without waiting for the accumulation of sufficient earnings. It is possible to erect a warehouse where needed. It is possible to purchase smaller chains. It is possible to conduct extensive advertising campaigns. It is possible to employ the best merchandising ability, and to purchase in large quantities, for cash.

The third advantage: Pricing and sales policy:

The general principle, here, seems to be large sales on small margins. Their prices generally are under those of their competitors. This low price makes a strong appeal to customers.

The selling price, normally, is fixed at headquarters, by adding a certain percentage to the purchase price, plus a share of the overhead, plus a share of selling expense.

The chain store is in a position to secure very much greater accuracy in this apportionment of overhead and selling expenses, than the ordinary retail store is. Now, the particular percentage that is added will vary with the nature of the product, and the strength of the competition.

The amount of this percentage is also greatly affected by the rate of turnover of particular goods.

This matter of turnover is of the utmost importance. The advantages of rapid turnover are savings in investment, interest, mark-down, salaries and wages, shelf or storage room.

The rate of turnover seems to be greater in chain stores
—or, rather, to be more rapid—perhaps that is a more ac-
[fol. 173] curate statement. The rate of turnover seems to be more rapid in chain stores than in independent stores, because of the skill in buying—that is, standard goods—skill in selling, co-operation of personnel, and the efficiency of the inventory system.

The rate of turnover seems to be more rapid in the large chains than in the small chains.

That seems to be unnoted in the independent stores. A department store with sales of ten millions will very likely have twice the turnover that a department store with sales under one million will have.

Now, the constant analysis of this turnover, which is made by the chain store, gives it a quick check on items which show profit and on those which show little, or no profit. This, of course, is required in their general policy of discarding those things from their stock which show a slow turnover.

The selling policies of the unit are determined by headquarters, and set rules are prescribed for the sales force—the object being, of course, to satisfy the customers.

It is sometimes assumed that service—what are the so-called services of stores, include only the granting of credit and making deliveries and giving personal attention to the customers. But the fact of the matter is that service includes everything which has to do with satisfying the customers—the conduct of the sales persons, their knowledge of the goods, the promptness with which they wait on customers and their tact in adjusting complaints. All of those things are suggested by the staff members at headquarters.

The fourth point—the promotion of sales:

(a) Under that heading would be advertising as a means of promoting sales.

This seems to be of growing importance, because of competition—that is, the competition that chain stores have [fo. 174] among themselves as well as the keener competition of the better independent stores.

Now, this advertising is usually prepared at headquarters, and is adapted to the local conditions, wherever it is necessary to make changes. It takes on something of the nature of institutional advertising, in a number of cases—the idea being, not so much to inform customers concerning the prices of particular goods, as to familiarize them with the habit and traditions of the store as an institution—that is, in the nature of publicity, trying to create a good will.

Now, the advantage of the chain store, here, is in the scope with which this advertising can be carried on, and in the skill with which it is prepared by the experts at headquarters.

(b) Another means of promotion of sales is by means of what is called display.

Now, this, also—or, at least the rules and the standards are prepared at headquarters. They have to do with the store front, the window display, and the interior arrangement.

The importance of this will vary, of course, with the different types of chains. Expert forces, or crews are employed by the chains, to go into a city and attend to these particular means of promotion of sales. And these are later checked up—at least, the efficiency of the display is checked up by supervisors or inspectors.

(c) Another means of promotion sales is by the use of leaders. This is also used by retail stores.

(d) Special sales—weekly sales, sometimes, are provided.

(e) Clearance and seasonal sales—these are of less significance to the chain store than to the retail store, because of the better buying ability, and the rapid turnover of stock.

(f) Finally, the keeping track of customers, by communication with customers, notifying them of prices and the supplies they have on hand, and finding out, if possible, why customers discontinue to trade at the stores, if such is the case.

Now, the fifth advantage has to do with the management [fol. 175] and method. All of this mechanism of trade would amount to nothing if it were not for the management. It would be about as useful as a locomotive which has no steam, and it seems to me that this matter of management and method constitutes the essential difference between the chains and the independent retailers. The latter—that is, the retailer, depends, primarily, on the ability of the owner, or owners. The single proprietorship of the chain store has almost disappeared. It is still found wherever they have local chains.

In its place we have efficient merchandising ability of a group of experts whose combined intelligence and ability constitutes a more powerful force than the average independent retailer has.

Now, such a method—such a plan gives opportunity for specialization in management, and a greater stability of business. But the advice, directions and instructions of the executives must be carried out, not by personal supervision, but by a system of methods which must be followed. There must be opened channels of communication and information between the executives and the more or less subordinate employes.

Provided the personnel is intelligent, loyal and well trained, this scheme is more efficient than that of the independent retailer. This system of methods provides all the activities of the chain store business. I will enumerate the more important of these.

(a) Locating of store. Now, that is not done in a haphazard way, at all. In the choice of cities, in the choice of sites in a particular city, you have a decision which is based upon the knowledge of facts. It is not guesswork, or chance. Business sites are listed and graded and valued by experts, the idea being to make it as easy as possible for customers to buy.

(b) Accounting. An elaborate system of accounting is absolutely essential in a chain store. Some of you may contrast with some of the retailers whom you knew in your communities in your younger days, who kept all the information in regard to the affairs of their business in their heads.

[fol. 176] The coming of the income tax—the United States income tax—has necessitated some improvement in the method of accounting in retail stores. The chain stores have devoted a great deal of attention to the standardization and the rearrangement of their accounting systems, to make them suitable to their particular chains. This accounting system supplies the operating information to executives, giving them a perspective of the whole business. It tends to keep down expenses. It serves as an automatic control of the business. It sounds danger signals in respect to expenditures, inventories and buying of stock. The manager knows, and he knows that he knows the facts in regard to his business.

Now, this system costs money and takes a great deal of time on the part of the managers. But it furnishes information that is essential to the managers, in making deci-

sions. The independent retailer cannot have such detailed information concerning his business.

(c) Personnel problems. This is said to be one of the most difficult in the chain stores. Many chain stores have placed the administration of this phase of their business under some high class officer—sometimes a vice president, who is designated "personnel director," or some other term is used.

Now, it is the main object of this personnel department, to maintain the morale, or the proper mental attitude of the employes. This department has to do with the selection and training of employes. It has much to do with fixing their remuneration and determining the matter of promotion of employes and managers and other officers, also. It attempts to create this proper morale by having conferences and conventions, by means of letters and bulletins and house magazines, by tests, by rewards and special bonuses. A great deal of attention has been given to that by the chain stores, and the working out of methods of remuneration and promotion.

(d) Stock control. I have already referred to the impor- [fol. 177] tance of rapid turnover—the importance of turning goods quickly at low profits.

The warehouse system, mentioned before, provides a closer control of the stock, and an adequate inventory system shows the amount of stock on hand from day to day, and when new stock must be put in, a certain minimum being provided, which is the signal for ordering stock, and a certain maximum being provided which shows a condition of overstocking, if such is the case.

The standardization of stocks makes it possible to carry out this stock control.

(e) Specialization. The large number of strong members makes specialization possible.

Here we have the application to management of the well known principle of division of labor, which has been so long used in manufacturing. Departmentization is carried out with an expert at the head of each department.

It is impossible for the independent retailer to be an expert in all fields. The tendency for the independent general store, to give way to the independent specialty store, is an

evidence of the attempt on the part of the independents to meet this situation. They realize that they cannot manage —one man cannot manage a store which caters to all of the wants of the public, so he specializes in shoes, or in jewelry, or in something else.

(f) Standardization. It seems to me that the keynote of the whole system is standardization.

Now, I recognize that there is danger of too much red tape, or bureaucracy, too much method, too little initiative, or personal judgment. There is that danger of those extremes.

But standardized methods are necessary, and must be enforced. Otherwise the chain will collapse of its own weight.

Any marked deterioration in the excellence of service on the part of the less competent managers is instantly checked, through this method of standardization.

[fol. 178] This process of standarization extends to every phase of the business—store establishment, layout, equipment, appearance, stock arrangement, methods of protecting the store, instructions for running the store and forms to be used in billing.

Now, that involves, of course, the employment of many inspectors and many supervisors, and it is an important element of the overhead.

But without standardization the chain store would be impossible, it seems to me.

Now, all of these advantages are interrelated and interdependent. Large capital makes possible large buying and better buying; it makes possible better management; better management makes possible the utilization of the capital more complete.

And so I say, these are all interrelated.

[fol. 179] I believe that the turnover in the larger chain groups is greater than it is in the smaller ones, particularly when they are handling the same commodities and the increased turnover tends to increase the profits unless the larger chain would take that into account in pricing goods. I believe, of course, that the element of competition might decrease in any instance the amount of net profit in the larger group. The contact of the chain store with the people of the community is not so close as that of the local merchant.

A local merchant is usually not only a buyer of goods, but a close friend of many people in the community in which he operates, and he exercises an important social influence in his town, or city. He participates actively in all efforts for its civic and social betterment.

Now, the chain store operators seem to have recognized this weakness, and at present there seems to be an effort in the direction of identifying themselves more intimately with community life.

But here is the great difficulty—the local merchant regards himself as a permanent resident of the community. The local manager of the chain, while he may participate in things while he is there, has an ambition to become the head of a larger store in a larger city, and to be advanced to the position of district supervisor or manager, or something of that kind.

While I think that some of the more prominent men in the chain store field have a feeling that they should do something, I think they are going to meet great difficulty in im- [fol. 180] pressing upon their managers that they have social responsibilities in the same degree that the local merchant has, and appreciate these responsibilities.

Cross-examination:

In certain respects relating to civic participation the tendency is for individual owners of stores to have a larger and better civic spirit than the manager of a chain store has, but I think there is a tendency among chain stores to correct and meet that situation. One of the developments of the chain store and one of the advantages which it has over the individual store is the insistence upon better methods of treatment of the public so as to meet the needs of the consuming public. I remember that I stated that one of the advantages of the chain store is not only in the element of prices but in all the elements that go to make up service. I referred there to the attempt of the management, from this system of methods, to impress upon the personnel—sales persons as they are called—the importance of satisfying the customer. These methods have been successful and are one of the good qualities of the chain store system, and in that they have an advantage over the average unit store.

The general effect of the chain store, on the average, on the question of prices is that they sell lower than the prices of the independents. I have no estimate of the amount in comparison. Of course if the independent stores attempt to compete the difference there will not be permanent. A store goes into a community and it sells these standard articles at less than the people of that community have been paying to the old line stores. Now, it may be that those stores will meet the prices and if they do the net result is that there is even a larger reduction in the saving to the public than if they declined to meet the prices. I know that many of the large chains do not advertise at all. There are some that do. I supposed that Woolworth, Kresge and Kress had [fol. 181] warehouses. Every advantage that I have spoken of as relating to the chain group is that which inheres, primarily, in volume and management without respect to whether it is involved in a chain group or in a single store. Good management makes for volume and volume makes for the possibility of making or acquiring more capital, and more capital makes for the possibility of employing the highest grade of experts, so that there is constant intercommunication or revolving. I would find the same advantage adhering in a large department store over a small one. Every quality that I have enumerated as going to the manner of organization relates itself, primarily, to there being a sufficient capital structure and volume of business to permit it to be carried on and I would add management in that it is an essential part of it. Originally, Woolworth, before he had a great volume of capital, developed a scheme of management and his capital and his skill in the management developed at the same time and the same thing is true in the case of L. S. Ayres & Company's store.

"Q. So that it does not relate itself to the form of organization—whether they are administering fifty or a hundred stores, or administering one store?

A. No, no.

Q. That is perfectly true, isn't it?

A. In fact I stated, I think, that I made the comparison with the average retail store.

Q. Yes, but I am trying to develop—and I think I am in harmony with you—that the advantages which you have enumerated do not relate to the form in which the business

is administered, but relate to the size of the business and the character of the owner?

A. Yes—if you put that in, I will say yes—the size of the business and the character of the owner.

[fol. 182] Q. The fact that it is administering multiplely owned stores has nothing to do with it, but it is the fact that it is administering a large business that develops the situation that you have referred to?

A. That is true. But I might add that the management of a large number of stores may contribute to the more rapid increases in the size.

Q. Just as the manager of a large unit store, with many departments, may develop the ability to strengthen and enlarge those departments?

A. Yes.

Q. And the problem would be identical, wouldn't it in the case of Macy or Gimbel—or, taking it locally, in connection with Ayres, or Block?

A. Yes, I would say the problem would be the same. There is no difference in the functions that are performed here—the function of retailing.

[fol. 183] TESTIMONY OF ALBERT H. GISLER

Direct examination:

I am Secretary of Kothe, Wells & Bauer Company, wholesale grocers, and of the Indiana Wholesale Grocers Association. Prior to my association with Kothe, Wells & Bauer Company I was for five years proprietor of the Grocers Supply Company. Prior to that I was Secretary of the Fishback Company. In the various occupations in which I have been engaged I have had occasion to study somewhat the conditions generally as to the chain store movement. That study has consisted of practical experience and I have also studied every pamphlet and publication which I could get my hands on covering this situation. I have traveled extensively over Indiana and various other states gathering information which would be of assistance to the company and the association with which I am connected. I feel that I am in a general way acquainted with the chain store movement and from my experience I am

acquainted with the problems of the individual merchant also. I know of the movement now being used toward cooperative purchasing and merchandising among retailers. There are possibly a dozen different cooperative schemes on foot at the present time. We have the Cooperative Wholsale Grocers, which is owned exclusively by the retail groceries. We have the Volunteer Chain, which, to a great extent, is controlled by the jobbers, tied up with several hundred retailers. Then we have the Nationwide Corporation, which sells stock to the independent grocer, and he pays three per cent above the cost of his goods, to that concern. Then we have another organization which sells no [fol. 184] stock, but charges a membership fee of twenty-five dollars per month, and it is supposed to sell merchandise to the independent merchant at actual cost, exclusive of the cash discount, which is retained by the operating company.

And there are others, but those are the principal ones. And I would say, offhand, that none of those have been successful, because of the fact that the merchants have jumped from one to the other, and it seems as if when — does not solve their problem, they go into another one, and find that it doesn't solve their problem.

I have heard the statement made that the independent stores are all in financial difficulty, but I think it is more an effort on their part to meet changing conditions. A great many times it is a matter of financial difficulties. The fact is that there is no other business where a few, only, have made more than a living, than in the grocery business and that has been true for twenty years. That is not true of the chain stores. Several years ago I was discussing with one of the citizens of Indianapolis, a merchant in town here, and he told me he was not interested in the chain store because it did not affect him. I met him on the street the other day and he said he was closing out his business because he could not make any money because they had entered his field of business. The underlying motive that has prompted these various cooperative movements is to purchase their goods on the same basis as the chain store and to engage in cooperative advertising. I would say those were the primary objects. I have had actual contact with merchants who have endeavored to operate under various cooperative plans and I don't know that it is the solution of the prob-

lem. Generally speaking, I have found that merchants en- [fol. 185] gaged in cooperative merchandising are not of the opinion that their problems are solved although some few individual merchants have expressed themselves differently. But I would say that ninety-eight per cent of the merchants do not feel that way, that is, all that I have talked to personally. The wholesalers enter into this cooperative movement in this way: In the case of the largest movement that I know of in the country—what we might call a super-organization—having its headquarters in Chicago—the Wholesale Grocer's Organization—charges a fee and it is a very considerable fee—I understand, in some instances as high as twenty-five thousand dollars, for the privilege of joining the organization, and it, in turn, sells this idea to the independent grocer who pays it various amounts. I am not familiar with the exact amount, but around ten dollars a week with the understanding that there is to be cooperative advertising, paid for by the wholesaler, and in return the retail grocer agrees to purchase practically all his goods from the jobber. We have been approached probably a hundred times to become a member of one of these cooperative groups as a wholesale unit, but we — absolutely independent. Generally, outside interests start these cooperative organizations and not the merchant. I am familiar with the practice in merchandising known as the sale of leaders. My only knowledge of the chain store attitude is from its advertising and I would say, undoubtedly, that the tendency is greater by far among the chains than the independent merchants to use these loss leaders, as we call them. In a great many instances they are sold for less than the jobber pays for the goods.

[fol. 186] Well, between the small, independent merchant and the manufacturer, you have, naturally, along the old line, and even the cooperative line, the wholesale grocer, who naturally comes in for a profit on the goods.

In addition to that I would say that the purchasing power of the large chain unit is, by far, greater than any single jobber has in the country.

I have found that this is the fact in my experience with Kothe, Wells & Bauer. It is not in every instance true that in buying from the manufacturer that the larger the order and the larger the demand the better the price. It is generally the rule that the carload price is supposedly the low-

est price. We do not give any advantage to our customers on account of volume. The price is the same to everyone, large or small. We accept the return of absolutely no goods and replace no goods unless there are swells in canned goods or something that we guarantee goes wrong. It is the rule of our business that we will under no circumstances exchange slow moving merchandise with one exception—if a merchant happens to break up we are glad to get our goods back to apply on the account. I have made a study of the operations of chain stores in rural communities, including grocery stores. We do not sell our car lots at less. We are in a different position from that of the manufacturer. On a majority of goods we make only a small per cent of profit. The Government statistics show that over the country the average gross profit of all the jobbers is a little over ten per cent. We have to operate on that and we can't make very much that way. We are really a middleman. We have no privilege of returning goods that we buy. If a man comes to us with a new item and [fol. 187] wants us to stock it, we occasionally stock it with a guarantee of sale clause on it, but on staple articles which we handle day in and day out we absolutely have no return on them. Our purchase price is largely controlled by the amount we buy.

"Q. What have you found to be the effect generally of chain store organizations upon the civic life of the rural communities and smaller cities in the State of Indiana?

Mr. Hornbrook: Your Honors, we object to that for the same reasons as before stated.

Judge Sparks: I think the objection ought to be sustained as to that question. That is sustained largely for the reason that it is cumlative. The evidence is already in and I understand it will not be met. Is that true, Gentlemen?

Mr. Hornbrook: I think we can concede that a man who lives in a community takes a greater interest in the community affairs.

Judge Sparks: I think the court may take that as a matter of judicial knowledge and in the interest of saving time the objection is sustained."

I have found that civic movements in a community have generally been entered into by the chain store operators

in that community and increasingly in the ratio to the increase in chain store management as shown in that community. A hypothetical case of a group of fifty stores in a given community and another group of two hundred stores similarly operated by another group, that being a ratio of four to one, the one having fifty outlets in a community or city and the other having two hundred and both seeking to run an advertisement in the local daily newspaper, of the [fol. 188] same size, or dimensions, they would have to pay the same price if they had the same space. There is no question about that. The man who had the two hundred stores would receive the greater benefit from that advertising. This is merely a matter of mathematics. If you take fifty and divide it into two hundred, you get four times the benefit per store, of the two hundred. Taking a group of fifty stores as against a group of two hundred, and both going to a manufacturer for the purchase of a commodity, my natural assumption is that the man with two hundred stores would receive the lowest price because he bought the most goods. I wouldn't say this was a general rule, but I think more of the manufacturers are beginning to play fair and I consider it a matter of fairness because the man with two hundred stores going to a manufacturer and obtaining a price advantage over the fifty stores on the same quantity of goods, I consider, certainly, unfair trade practice. If a chain store organization is operating in a given community with ten stores and it has certain buying power because of its having these ten stores, and it contemplates the opening of an eleventh store of the same type and character as the ten then in operation, there are certain fixed charges, and I assume that they would remain the same, such, for example, as rent—instead of dividing the rent into ten parts they would be able to divide it into eleven parts, that is, their warehouse rent. The same would hold true of the executives' salaries and various other fixed charges. Possibly, insurance might be a little bit affected because of the fact that they would have to carry a little more risk, but the fixed charges would be very materially reduced as the number of stores increased—I mean reduced in proportion to the charge per store, to each store. For [fol. 189] example, if you had rent at two hundred dollars a month and you had ten stores, that would be a charge of

twenty dollars to each store, but if you have eleven stores there would be one-eleventh—that is your warehouse charge. That is an item that would be affected very materially. Our experience has been that the same help at the warehouse could handle one additional store without any trouble and I know that in our own business there was an increase in sales without an increase in the cost of general labor. That cost does not increase in proportion to the increase of business—at least in our business we have found it so. Light, heat and executives' salaries would be affected as would taxes. They would not have to buy as much more of the items and administrative expenses, such as bookkeepers, etc., wouldn't show any material increase.

Cross-examination:

My assumption concerning the overhead being reduced after the addition of one unit to ten units was on the theory that you always have enough slack in the organization, warehouses and other general facilities to take on a new unit, but there are certain factors that there isn't any slack in such as rent. Theoretically, it is wasteful to the extent that you provide warehousing facilities, supervision and other services beyond the need of the business, and on the average, these facilities theoretically should be provided in such a way that they could be increased as the business grows to avoid wastefulness. I am talking about my practical experience. Our business has been helped practically—I happen to be very materially interested in the cost of the operation of our business because I have to watch [fol. 190] the conditions as they arise and before we started to make a close survey of our business our costs in doing three fourths of the business which we are now doing were very close to what they are at the present time. I mean by that, that we were not running our business in the first place as efficiently as we should. It was indicated to us that we had not been as careful with our costs as we should have been; that we were spending more money for that service than we should have spent. This matter of reducing expenses is a hobby of mine and I inaugurated it in our business five years ago. It should be a hobby in all efficient well run businesses and today it is an actual necessity.

Q. As a matter of fact, those reductions in expenses that you refer to, for your store, have no relation to the store, but have relation to the quantity of business done—in other words, you require more warehousing?

A. You are buying your goods for the store to sell.

Q. The problem of saving relates to the quantity of business done, does it not?

A. But the volume could not be obtained without the addition of the store.

Q. If sales were increased in the individual unit stores, you would have the same results, would you not?

A. Yes, you would.

Q. As a matter of fact, you would have more savings if you had it in one unit—you would have less rent, and such things, than if you added a new store?

A. Yes.

The civic spirit in a community varies with practically every individual. There are troubles in every community [fol. 191] over this man or that man who does not respond to the demand for civic spirit. In its essentials it reverts to types of men and individuals. We find people responding to civic spirit in self-interest, by compulsion or the desire to be helpful. This is true of every community with or without chain stores. I have been studying the question of the retail grocery a long time. There has always been a great mortality among retail grocers on the financial side. This has come to a great extent from the inefficient operation of the stores and the men didn't know the business, competition and various other things that commonly enter into business. While I would not say it is generally true in many instances the small grocery store has been the dumping ground for those who don't have anything else to do and wanted to try and make a living, and they go and buy a grocery store, a farmer, a retired man or a widow, and a grocery store is established in the community, and no question of efficiency seems to have entered into the matter. The outstanding reasons for the great mortality in the grocery field are inefficiency, competition and lack of capital. A good many of the small grocers haven't sufficient capital. The manufacturers take into consideration the quantity factor and I have found this true as a wholesaler in buying from them. The majority of manu-

facturers do not sell direct to the retail grocery. They sell through a jobber. In the grocery business you cannot go direct to the manufacturer, regardless of the quantity which he would buy he would have to buy through the wholesaler. I don't think that is true in every instance, but in many instances. Some manufacturers probably do not make a discrimination as to whom they sell to.

[fol. 192] Redirect examination:

At a recent meeting in Chicago attended by manufactureres, jobbers, brokers, and chain store operators, a conference was had at which the Federal Trade Commission was endeavoring to clear up the matter of secret rebates and various unfair practices that were in vogue and there were certain interests represented at the conference who did not agree to the principles laid down by the commission as to these secret rebates and advertising allowances.

Q. And who were those?

Mr. Hornbrook: We object to that, if the court please.

Judge Sparks: Objection sustained.

Mr. Hufsmith: The defendants offered to prove and the witness would have testified had he been allowed to answer that the A. & P. Store group and the other chain store groups generally attending the conference would not agree to the acceptance of the standards as laid down by the Federal Trade Commission but which plans were accepted as to trade discounts, secret rebates and advertising allowances by the manufacturers and others represented, excepting the chain store interests.

(Here follows Exhibit "1," side folio 193.)

[fol. 194] The foregoing statement of the evidence as lodged with the clerk of the United States District Court for the Southern District of Indiana is approved, and may be filed forthwith.

Samuel Ashby, Smith, Remster, Hornbrook & Smith, Thompson, Rabb & Stevenson, Solicitors for Lafayette A. Jackson.

Exhibit No. 1 was now offered and read in evidence and is in words and figures as follows, towit:

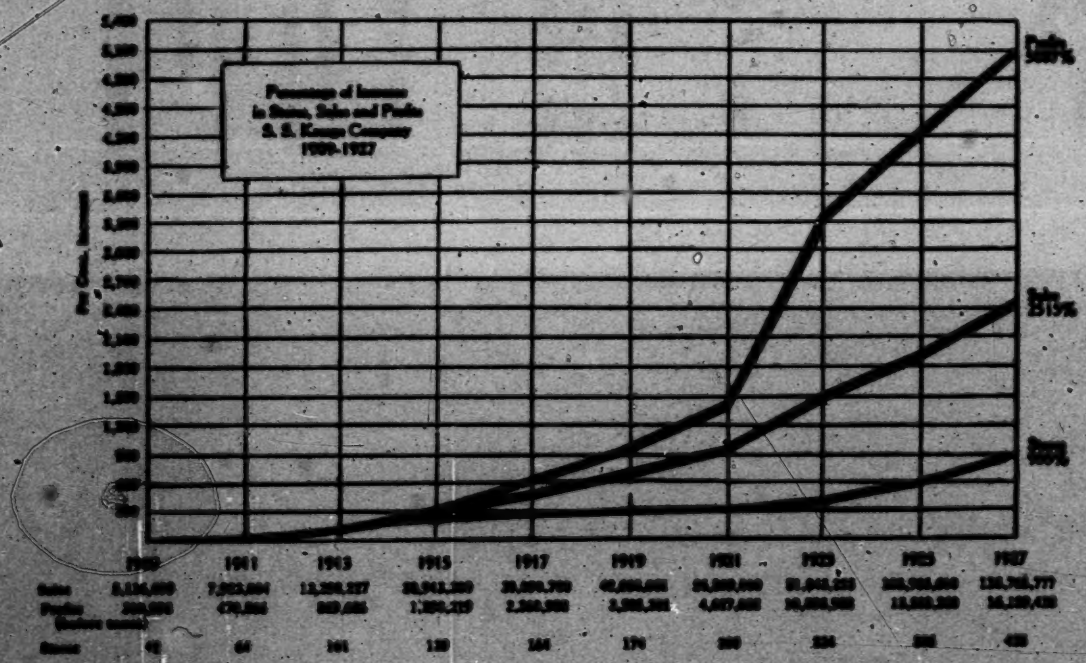
EXHIBIT NO. 1
JAN 2 1930

344

S. S. Kresge Company

Detroit, Mich.

Operating a chain of 439 stores selling merchandise at prices ranging from 5 cents to $1.00



Remarkable as the growth of the Kresge business has been, the growth of an original investment in the Company's Common Stock has greatly eclipsed this record.

An investor who purchased, for example, 100 shares S. S. Kresge Company Common Stock at $45 per share at the first offering in 1912, and who exercised subsequent subscription privilege, has seen his initial investment grow to 6,160 shares at present, valued, at current quotations, in excess of $400,000. This represents an appreciation in the investment of 6,500%. This does not take into account the cash dividends received during the period, aggregating $39,529, an annual average of $2,600, or 40% yearly on the total original investment.

We believe S. S. Kresge Common Stock holds possibilities for further enhancement in value over the long-term future.

Merrill, Lynch & Company

Investment Securities

[illegible] Broadway 11 East 42nd St.

STORES

EXHIBIT NO. 1
JAN 2 1930

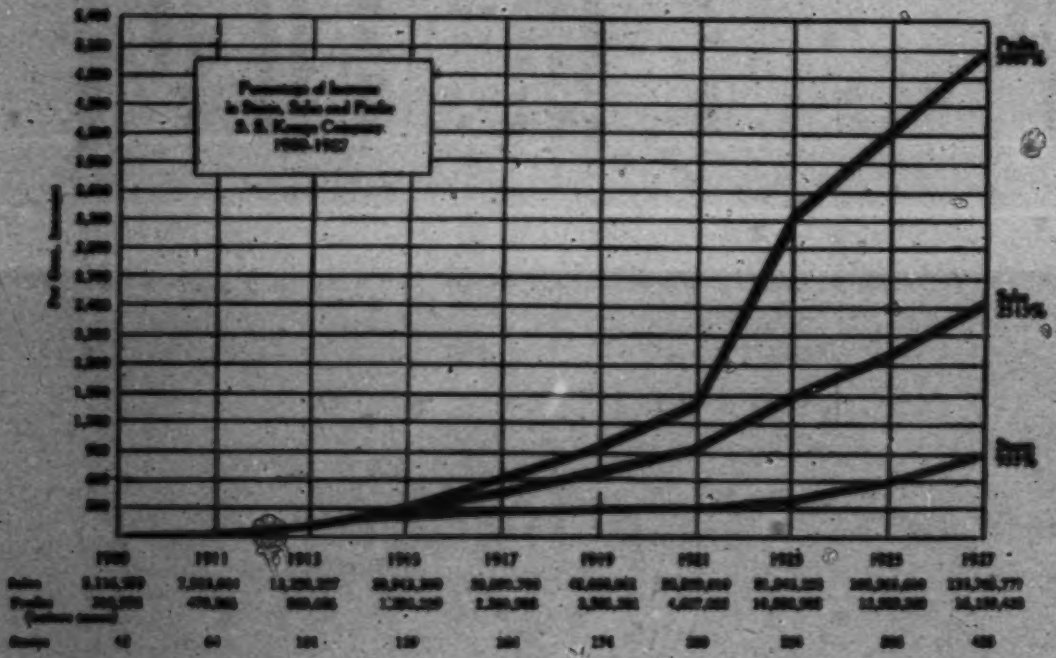
344

...28 Edition

S. S. Kresge Company

Detroit, Mich.

Operating a chain of 439 stores selling merchandise at prices ranging from 5 cents to $1.00



Remarkable as the growth of the Kresge business has been, the growth of an original investment in the Company's Common Stock has greatly eclipsed this record.

An investor who purchased, for example, 100 shares S. S. Kresge Company Common Stock at $45 per share at the first offering in 1912, and who exercised subsequent subscription privilege, has seen his initial investment grow to 6,160 shares at present, valued, at current quotations, in excess of $400,000. This represents an appreciation in the investment of 6,500%. This does not take into account the cash dividends received during the period, aggregating $39,529, an annual average of $2,600, or 40% yearly on the total original investment.

We believe S. S. Kresge Common Stock holds possibilities for further enhancement in value over the long-term future.

Merrill, Lynch & Company

Investment Securities

120 Broadway — 11 East 43rd St.

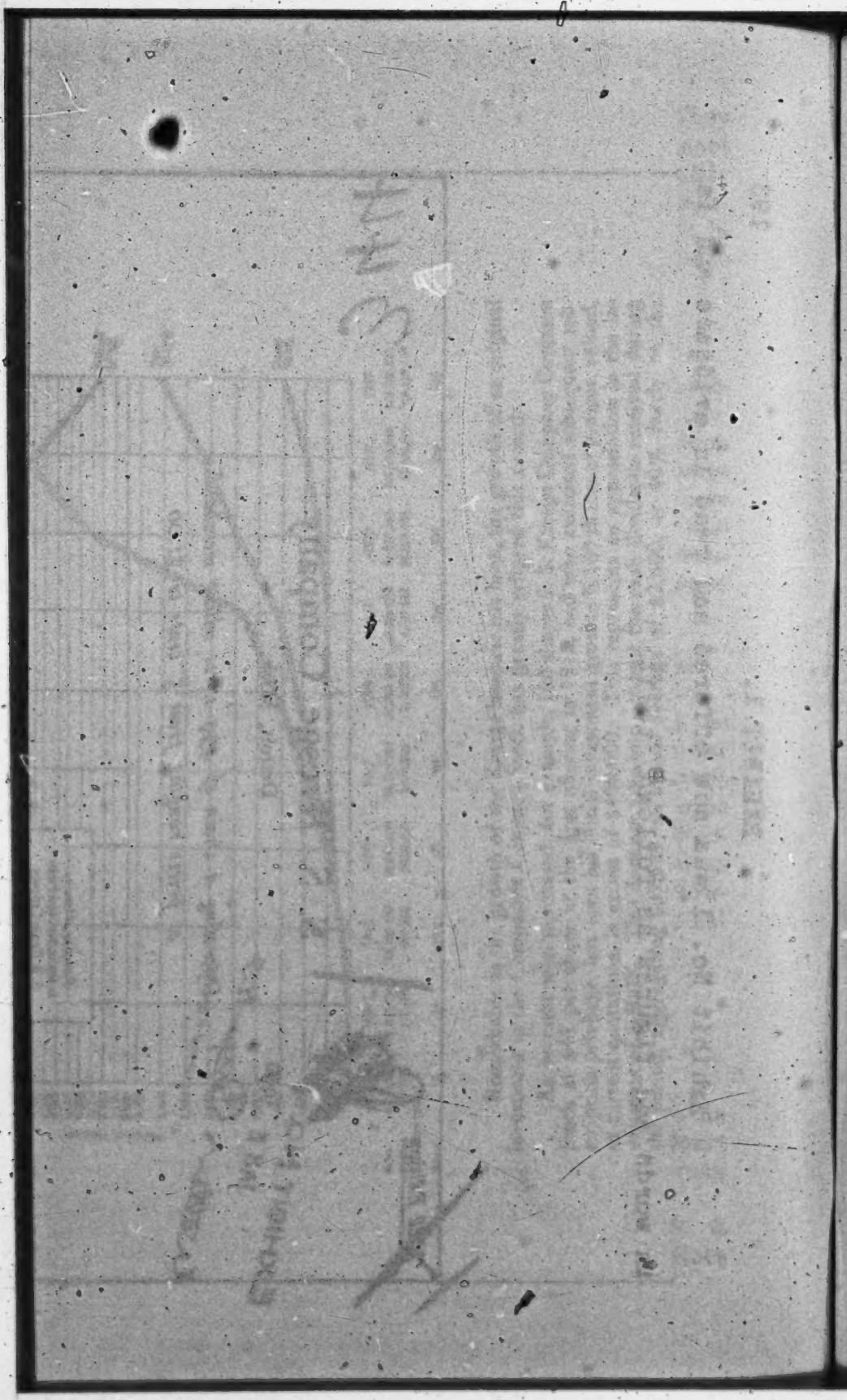
New York

Chicago — Detroit — Milwaukee — Denver — Los Angeles

Members of the New York, Chicago, Detroit and Cleveland Stock Exchanges

Direct private wires to these markets

CHAIN STORES



IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE—May 7, 1930

The foregoing narrative form of testimony is hereby approved this 7 day of May, 1930.

Robert C. Baltzell, Judge of the District Court of the United States for the Southern District of Indiana. Will M. Sparks, Judge U. S. Circuit Court of Appeals. Thos. W. Slick, Judge.

[fols. 194½ & 195] [File endorsement omitted.]

[fol. 196] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed May 7, 1930

To the Clerk of said Court:

You will please prepare and certify to a transcript of the record in the above entitled cause for appeal to the Supreme Court of the United States pursuant to law, and include therein the following:

1. The Bill of Complaint.
2. The Marshal's return of Service.
3. The Defendant's Motion to dismiss the Bill of Complaint.
4. The order of the Court overruling the Defendant's Motion to dismiss the Bill of Complaint and all exceptions taken thereto and allowed by the court.
5. All orders concerning the convening of the court consisting of three Judges and the temporary injunction.

[fol. 197] 6. The Defendant's Answer.

7. The Order substituting James Showalter for William A. Hough as a defendant.
8. The written opinion of the court.
9. The final decree.
10. The narrative of the evidence, proof of notice of lodgement with clerk of narrative of the evidence and approval by court.

11. Defendants' Petition for Appeal, Assignment of Errors and Prayer for Reversal.
12. The order allowing the Appeal.
13. The Appeal Bond and Order approving the Bond and Surety thereon.
14. The Citation and Proof of Service thereof.
15. This Præcipe.
16. All entries concerning filing or entry of above mentioned papers or orders; and all exceptions to rulings.

James M. Ogden, Attorney General, Indiana; Connor D. Ross, Assistant Attorney General; Joseph W. Hutchinson, Deputy Attorney General; Geo. Hufsmith, Deputy Attorney General; V. Ed. Funk, Deputy Attorney General, Solicitors for Defendants (Appellants).

[fol. 198] The undersigned hereby accept service of the foregoing præcipe and acknowledge the receipt of a copy thereof for and in behalf of the plaintiff this 7th day of May, 1930.

Samuel Ashby, Smith, Remster, Hornbrook & Smith, Thompson, Rabb & Stevenson, Solicitors for Plaintiff (Appellee).

[fol. 199] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 200] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed June 9, 1930

Come now the appellants in the above entitled cause and state that the points which they intend to rely upon in this court in this case are as follows:

Point 1. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in overruling the appellants' (Defendants below) motion to dismiss the bill of complaint.

Point 2. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in holding and deciding that the classification as contained in Section 5 of Chapter 207 of the Acts of the General As- [fol. 201] sembly of the State of Indiana of 1929 is not reasonable and does not rest upon a ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

Point 3. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in holding and deciding that under the evidence in the case there are many persons and firms in Indiana doing a business similar to that of the plaintiff and having but one store with a much larger investment and a much larger gross income, who under Section 5 of Chapter 207 of the Acts of the General Assembly of Indiana of 1929 will be required to pay only three dollars annually as against $5,443.00 annually required to be paid by the plaintiff on account of his two hundred and twenty-five stores.

Point 4. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in holding and deciding that all persons engaged in the operation of one or more stores of mercantile establishments within the State of Indiana belong to the same class for occupation tax purposes as the plaintiff and should pay the same license fee regardless of the number of stores owned and operated by them and that any other classification is arbitrary and in violation of the constitutional rights of the plaintiff.

Point 5. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in holding and deciding that there is no real and substantial difference within the law granting to the state legislature the authority to classify occupations for the purpose of taxation between the person who reaches his trade through the establishment of more than one store located in various parts of a community and operated under the same general management, supervision and control, and the person who [fol. 202] owns but one store and reaches his trade by

means of delivery or by requiring his trade to call at the one store so owned by him.

Point 6. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in holding and deciding that a classification for the purpose of imposing an occupation tax upon the basis of number of stores operated under the same general management, supervision and control as provided in Section 5 of Chapter 207 of the Acts of the General Assembly of Indiana of 1929, if enforced, will deny the owner of more than one store of the equal protection of the law as guaranteed by the Constitution of the United States and will deprive him of his rights under the Constitution of the State of Indiana.

Point 7. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in holding and deciding that Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 is void and in violation of the Constitution of the United States and of the State of Indiana.

Point 8. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its decree in granting and issuing the injunction herein.

And the appellants further state that the whole record as filed is necessary for the consideration of the case and needs to be printed by the clerk for the hearing of the case.

[fol. 203] James M. Ogden, Attorney General; George W. Hufsmith, Deputy Attorney General; Joseph W. Hutchinson, Deputy Attorney General; V. Ed. Funk, Deputy Attorney General, Counsel for Appellants.

[fol. 204] NOTICE TO APPELLEE OF FILING OF STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF the PARTS OF THE RECORD TO BE PRINTED

To the appellee in the above-entitled cause:

You are hereby notified that the appellants in the above entitled cause will, within fifteen days after docketing said

case, file with the clerk of the Supreme Court of the United States the foregoing statement of points to be relied upon and designation of the parts of the record to be printed and of this you will take notice and govern yourself accordingly.

[fols. 205 & 206] James M. Ogden, Attorney General; Joseph W. Hutchinson, Deputy Attorney General; George W. Hufsmith, Deputy Attorney General; V. Ed. Funk, Deputy Attorney General Counsel for Appellants.

The undersigned hereby accept service of the foregoing notice for and in behalf of the appellee, and acknowledge receipt of a copy thereof this 7 day of June, 1930.

Wm. H. Thompson, Thompson, Rabb & Stevenson, Attorneys for Appellee.

[fol. 207] [File endorsement omitted.]

Endorsed on cover: File No. 35,105. Southern Indiana D. C. U. S. Term No. 183. State Board of Tax Commissioner of the State of Indiana, James Showalter, Pliny H. Wolfard, etc., et al., appellants, vs. Lafayette A. Jackson Filed June 4, 1930. File No. 35,105.

FILE COPY

JUN 28

CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 183

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD and PHILIP ZOERCHER, AS MEMBERS OF STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES M. OGDEN, ATTORNEY GENERAL OF THE STATE OF INDIANA,

Appellants,

v.

LAFAYETTE A. JACKSON,

Appellee.

APPELLANTS' STATEMENT AS TO JURISDICTION ON APPEAL

JAMES M. OGDEN,
Attorney General of Indiana.
JOSEPH W. HUTCHINSON,
Deputy Attorney General of Indiana,
GEORGE W. HUFSMITH,
Deputy Attorney General of Indiana,
V. ED. FUNK,
Deputy Attorney General of Indiana,
Counsel for Appellants.

FT. WAYNE PTG. CO. FT. WAYNE, IND.

TABLE OF CONTENTS

Authorities Cited:
Ex Parte Buder, 271 U. S. 461..... 8
Moore v. Fidelity & Deposit Co., 272 U. S. 317..... 8
Smith v. Wilson, 273 U. S. 388..... 8
Date of Decree and Application for Appeal..... 5
Nature of Case and Ruling Below..... 6
Statutory Provision Sustaining Jurisdiction..... 3

Supreme Court of the United States

OCTOBER TERM, 1930

No. 183

STATE BOARD OF TAX COMMISSIONERS
OF THE STATE OF INDIANA,
JAMES SHOWALTER,
PLINY H. WOLFARD and
PHILIP ZOERCHER, AS MEMBERS OF
STATE BOARD OF TAX COMMISSIONERS
OF THE STATE OF INDIANA,
JAMES M. OGDEN, ATTORNEY GENERAL
OF THE STATE OF INDIANA,
Appellants,

v.

LAFAYETTE A. JACKSON,
Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL

May It Please the Court:

The appellants in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully present:

A

STATUTORY PROVISION SUSTAINING JURISDICTION

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936,938, provides that Sections 238 and 266 of the Judicial Code are amended to read as follows:

"Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise."

"Sec. 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time

before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL

The decree sought to be reviewed was entered on the 14th day of February, 1930. (Record pp. 85-87*).

The application for appeal was presented on the 7th day of May, 1930. (Record pp. 91-96*).

NATURE OF CASE AND RULING BELOW

This is an appeal from a final decree of the United States District Court, Southern District of Indiana, three judges sitting in the cause wherein the appellee filed a Bill of Complaint against the appellants to enjoin the enforcement of an Act of the 76th Session of the General Assembly of Indiana, Acts 1929, Chapter 207, passed on the 11th day of March, 1929, and approved and signed by the Governor on the 16th day of March, 1929; Section 13 of said Act provides that the Act, except Section 11, shall be in effect from and after the first day of July, 1929. Said Act of 1929, Chapter 207, requires licenses for the operation, maintenance, opening or establishment of stores in the State of Indiana, prescribing the license and filing fees to be paid therefor, and disposition thereof, and the powers and duties of the State Board of Tax Commissioners in connection therewith, and prescribing penalties for the violation thereof.

It is alleged further in said Bill of Complaint that the plaintiff (appellee) is a citizen and resident of Marion County, Indiana, and the owner and operator of 225 stores in the City of Indianapolis, each situated at different locations and from which he sells groceries, fresh vegetables and meats at wholesale and at retail. That the amount in controversy is alleged to exceed the sum of three thousand dollars, exclusive of interest and cost.

The basis for the relief prayed for is the claim that the above referred to Act of the General Assembly of the State of Indiana is unconstitutional and void, because:

First. "Said act violates the provisions of the Fourteenth Amendment of the Constitution of the

United States in that it deprives the plaintiff of his property without due process of law and denies to the plaintiff (appellee) the equal protection of the laws."

Second. "Said act violates the provisions of the Fourteenth Amendment of the Constitution of the United States in that it is an unwarranted abridgement of the rights and privileges guaranteed to the plaintiff (appellee) by said Fourteenth Amendment."

Third. "That said act is invalid because it violates Section 23 of Article 1 of the Bill of Rights of the Constitution of Indiana."

Fourth. "That said act violates Section 1 of Article 10 of the Constitution of Indiana." (Bill of Complaint, Record pp. 2-22*).

After all issues were formed the cause was submitted for trial before the Honorable Will H. Sparks, Circuit Judge, Honorable Robert C. Baltzell and Thomas W. Slick, District Judges. The court after hearing all evidence submitted in said cause decreed the above referred to Act was in violation of the Fourteenth Amendment of the Constitution of the United States and the Constitution of Indiana, and enjoined the defendants (appellants) from the enforcement of said act. (Record pp. 85-87*).

Opinion as read by said court appears in the record on pp. 71 to 84*.

---

*NOTE: All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the United States District Court, Southern District of Indiana, and on file with the Clerk of this Court. The record has not yet been printed.

D

CASES BELIEVED TO SUSTAIN JURISDICTION

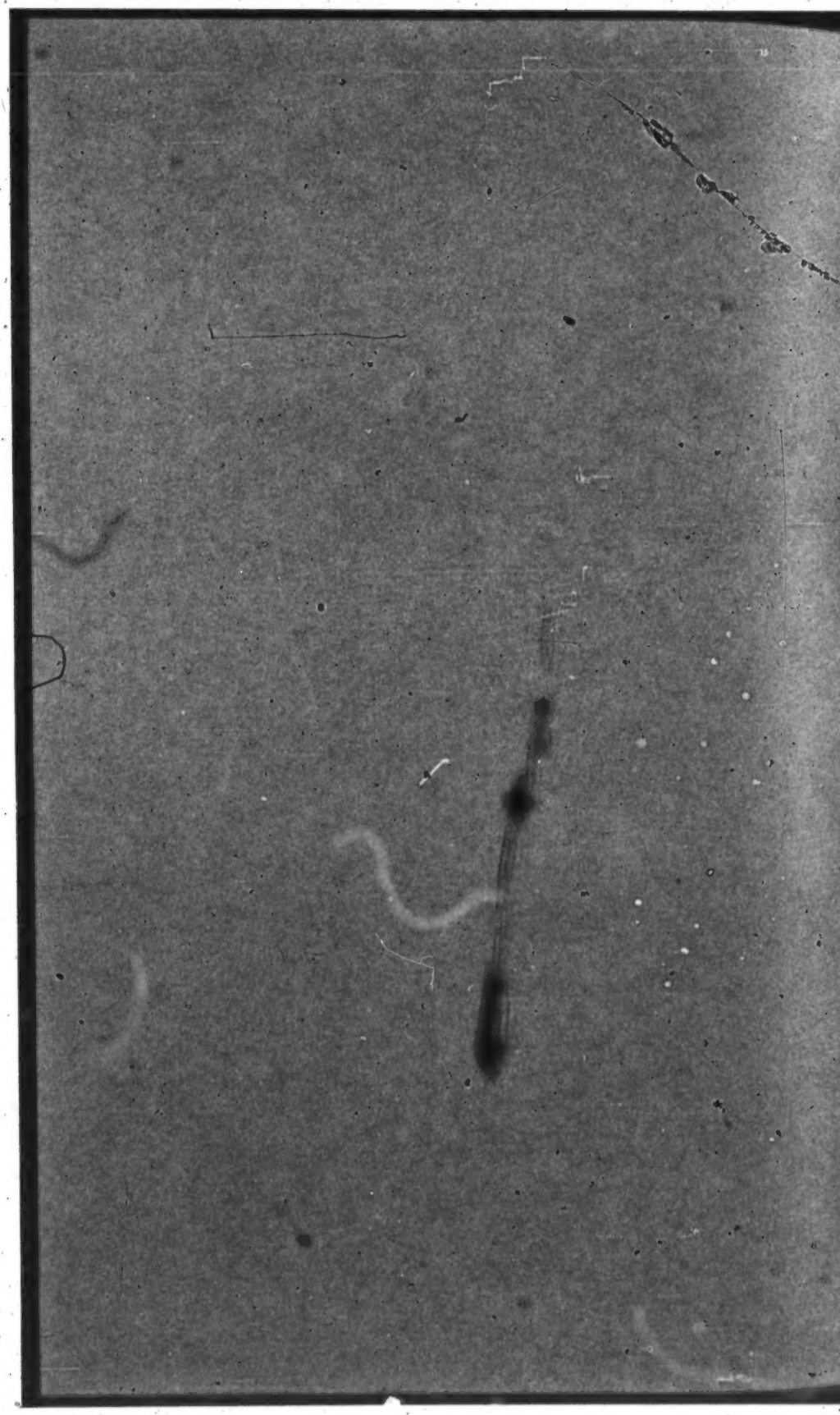
The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Moore v. Fidelity & Deposit Co., 272 U. S. 317, 320-321;
Smith v. Wilson, 273 U. S. 388;
Ex Parte Buder, 271 U. S. 461, 465.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Sections 238 and 266 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

JAMES M. OGDEN,
Attorney General of Indiana.
JOSEPH W. HUTCHINSON,
Deputy Attorney General of Indiana,
GEORGE W. HUFSMITH,
Deputy Attorney General of Indiana,
V. ED. FUNK,
Deputy Attorney General of Indiana,
Counsel for Appellants.



FILE COPY

FILE
DEC 9
CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1930.

No. 183.

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD AND PHILIP ZOERCHER, AS MEMBERS OF STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA; JAMES M. OGDEN, ATTORNEY GENERAL OF THE STATE OF INDIANA, DEFENDANTS - - - - - Appellants

vs.

LAFAYETTE A. JACKSON, PLAINTIFF - - Appellee

BRIEF FOR STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD AND PHILIP ZOERCHER, AS MEMBERS OF STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA; JAMES M. OGDEN, ATTORNEY GENERAL OF THE STATE OF INDIANA, DEFENDANTS - APPELLANTS.

JAMES M. OGDEN,
Attorney General of Indiana.
JOSEPH W. HUTCHINSON,
Deputy Attorney General of Indiana.
GEORGE W. HUFSMITH,
Deputy Attorney General of Indiana.
V. ED. FUNK,
Deputy Attorney General of Indiana.
HUGH D. MERRIFIELD,
Deputy Attorney General of Indiana.
Solicitors for Defendants - Appellants.

FT. WAYNE PTG. CO. FT. WAYNE, IND.

INDEX.

	Page
Opinion of the Court Below—Where Reported	6
Specification of Assigned Errors	14-16
Statement of the Case	7-14
Summary of the Argument	16-29
Argument	29-53

CITATIONS.

CASES CITED.

Page

Alaska Fish Co. vs. Smith, 255 U. S. 44....22, 23, 42, 44, 50
American Sugar Refining Co. vs. Louisiana, 179 U. S. 89-94 .....17, 20, 22, 23, 26, 29, 33
Armour Packing Co. vs. Lacy, 200 U. S. 226-235 .....17, 19, 26, 35
Armour & Co. vs. Virginia, 246 U. S. 1-6.....
Bailey vs. George, 259 U. S. 16.....23
Baldwin Tool Co. vs. Blue, 240 Fed. 202.....28
Banta vs. City of Chicago, 172 Ill. 204-219.....25
Bell's Gap R. R. Co. vs. Pennsylvania, 134 U. S. 232-237 .....17, 20, 26, 34
Booth vs. Indiana, 237 U. S. 391, 397.....45
Bradley vs. City of Richmond, 227 U. S. 477.....28
Bright vs. McCullough, 27 Ind. 223.....28
Chicago, etc., R. Co. vs. Arkansas, 219 U. S. 453-456.....24
Citizens Telephone Co. vs. Fuller, 229 U. S. 322, 329, 331 .....18, 20, 21
City of Los Angeles vs. Los Angeles Ind. Gas Co., 93 Pac. 1006 .....22, 24, 46
Chandler Coal Co. vs. Sams, 170 Ind. 623, 627, 628.....45
Consumer's League vs. Colorado, etc., R. Co., 125 Pac. 577 24
Cummins vs. Pence, 174 Ind. 115.....
Curdts vs. South Carolina Tax Comm. 131 S. C. 363....45
Dane vs. Jackson, 256 U. S. 589, 598, 599.....18, 20, 21
Douglas vs. Noble, 261 U. S. 165-168.....26, 51
Ex parte Thornton, 12 Fed. 538-548.....24
Gafill vs. Bracken, Aud. 195 Ind. 551-558.....27, 28, 51

Graham vs. DuPont, 262 U. S. 234.....23
Great Atlantic and Pacific Tea Co., et al. vs. Maxwell, Commissioner, etc., (N. C.) 154 S. E. 838..20, 21, 22, 48
Gundling vs. Chicago, 177 U. S. 183, 189.....30
Hart Refineries vs. Harmon, Treas., 49 Supreme Court Reporter, 188-189 .....17, 18, 20, 26, 29
Jones vs. City of Portland, 245 U. S. 217.....26
Kersey vs. City of Terre Haute, 161 Ind. 471, 472, 474...27
Leonard vs. Earl, 49 Supreme Court Reporter, 372.....25
Metropolis Theatre Co. vs. Chicago, 228 U. S. 61-69 .....19, 22, 23, 28, 39, 45, 50, 51
Metropolitan Life Ins. Co. vs. City of Paris, 138 Ky. 801; 129 S. W. 112.....18
McLean vs. Arkansas, 211 U. S. 539, 547.....18, 45
Michigan Central R. R. Co. vs. Powers, 201 U. S. 245-293 .....18, 20, 21
Michigan Railroad Tax Cases, 138 Fed. 223-241...18, 20, 38
New York vs. Latrobe, 49 Supreme Court Reporter, 877 22
Nashville, etc., R. Co. vs. City of Attalla, 118 Ala. 362...46
Oliver Iron Co. vs. Lord, 262 U. S. 172-179....18, 20, 21, 22
Quong Wing vs. Kirkendall, etc., 223 U. S. 59, 62, 63 .....19, 22, 23, 28, 39, 44, 50, 51
Railroad Company vs. Peniston, 85 U. S. 5-29....17, 19, 31
Rosenbloom vs. State of Nebraska, 64, Neb. 342, 89 N. W. 1053, 57 L. R. A. 922.....25, 47
Royall vs. Virginia, 116 U. S. 592, 597.....17, 32
Singer Sewing Machine Co. vs. Brickwell, 233 U. S. 304 .....22, 24
Smith vs. Stephens, 173 Ind. 564.....
Southwestern Oil Co. vs. Texas, 217 U. S. 114-124-126 .....17, 18, 19, 21, 22, 26, 29, 36
State vs. Hammond Pkg. Co., 233 U. S. 331.....27

State ex rel Lewis, et al. vs. Smith, Aud., 158 Ind. 543, 546 27
Strange vs. Board, etc., 173 Ind. 640, 644 45
Thomason vs. State, 15 Ind. 449 28
United States ex rel vs. Madison County, 263 U. S. 718 .. 26
Union Pacific R. Co. vs. Lincoln County, Fed. Cas. No. 14379 (2 Dill. 279) 23
W. W. Cargill vs. Minnesota, 180 U. S. 452-469 .... 22, 23, 24

STATUTES CITED.

Page
Acts of the General Assembly of Indiana for the Year 1929, pp. 693 to 698 ..... *19
Article 1, Section 23, Indiana Constitution, Burns Ann. Ind. Stat. 1926, Sec. 75 ..... **28
Article 10, Section 1, Indiana Constitution, Burns Ann. Ind. Stat. 1926, Sec. 200 ..... ***51
Sec. 162, ch. 345, Laws of North Carolina 1929 48

TEXTS CITED.

Cooley on Taxation (4th Ed.) Secs. 349, 350 ..... 18, 20, 21, 28, 38, 51
Cooley on Taxation (4th Ed.) Sec. 1717 ..... 25, 47
Cooley on Taxation (4th Ed.) Sec. 1679 25
Cooley on Taxation (3rd Ed.) Page 9, 46 ..... 30, 31

(Footnote) *For full text see appendix 54
**For full text see appendix 61
***For full text see appendix 61

IN THE

Supreme Court of the United States

October Term, 1930.

No. 183.

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD AND PHILIP ZOERCHER, AS MEMBERS OF STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA; JAMES M. OGDEN, ATTORNEY GENERAL OF THE STATE OF INDIANA, DEFENDANTS - - - - - - - - - Appellants

vs.

LAFAYETTE A. JACKSON, PLAINTIFF - - - Appellee

BRIEF FOR STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD AND PHILIP ZOERCHER, AS MEMBERS OF STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA; JAMES M. OGDEN, ATTORNEY GENERAL OF THE STATE OF INDIANA, DEFENDANTS - APPELLANTS.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the District Court is reported in 38 Fed. Rep. (2d Series) 652, the same being the opinion in No. 1188 in equity in the District Court for the Southern District of Indiana, Indianapolis Division, rendered February 1, 1930. The opinion is copied beginning on page 51 of the printed Transcript of Record.

II.

STATEMENT OF THE CASE.

This case was begun in the court below by the appellee by filing his Bill of Complaint in Equity, (pp. 1-16) seeking relief by injunction against the enforcement by the appellants of Chapter 207 of the Acts of the General Assembly of the State of Indiana enacted at its 1929 session, on the ground that said Act is unconstitutional. For the convenience of the Court the Act in its entirety is set out in full in the appendix.

The Act was assailed upon four separate grounds as follows:

It was claimed—

First. Said act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of his property without due process of law and denies to the plaintiff the equal protection of the laws. (p. 11).

Second. Said act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarranted abridgement of the rights and privileges guaranteed to the plaintiff by said Fourteenth Amendment. (p. 13).

Third. That said act is invalid because it violates section 23 of article 1 of the Bill of Rights of the Constitution of Indiana (p. 13).

Fourth. That said act violates section 1 of article 10 of the Indiana Constitution. (p. 14).

It was claimed upon the other hand that the act does not violate any of the constitutional provisions, State or Federal, above enumerated; that it is justified as a police measure as well as a revenue measure and that the classification provided in section 5 of the act is reasonable and not open to the charge of unconstitutional discrimination.

Section 5 of the act is as follows:

"Sec. 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fees prescribed in sections 2 and 4 of this act.

The license fees herein prescribed shall be as follows:

1. Upon one store, the annual license fee shall be three dollars for each such store;

2. Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

3. Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

4. Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

5. Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store." (pp. 6-7).

The claim of validity of said legislation was first presented by a motion to dismiss the Bill of Complaint (pp. 17-32) which was overruled. (p. 32). A temporary injunction issued. (pp. 32-35). Issues were joined by the filing of an answer. (pp. 35-50). Evidence was heard by a three-judge court and on February 15, 1930, a final decree was entered perpetually enjoining the appellants from enforcing said Chapter 207 of the Acts of the General Assembly of the State of Indiana for the year 1929 and adjudging said act to be invalid and void as violative of the Constitution of the State of Indiana and of the Constitution of the United States. (pp. 65-66).

THE EVIDENCE.

A large mass of evidence was introduced upon the question of the desirability of the "chain store" method of distribution from the economic viewpoint, much of which is of no relevance to the question under consideration, and the net result of which is that there is a difference of opinion on the subject. (p. 115).

The Growth of the Chain Store.

It should be noted as bearing upon the question that the Atlantic and Pacific Tea Company, the largest and oldest of the "chains" in the United States, was founded not many years after the Civil War, although at that time it was hardly comparable with the present day chain system of food distribution. It began in 1890 to emerge into something resembling its present retail system. (p. 84). The A. & P. Company now owns the entire capital stock of the Great Atlantic and Pacific Tea Company of Arizona; it

also controls the Great Atlantic & Pacific Tea Company of New Jersey through ownership of its entire capital stock. (pp. 87-88). The witness Lyons stated that he believed said company owns the entire capital stock of the Great Atlantic & Pacific Tea Company, Ltd., possibly, the Great American Tea Company and the American Coffee Corporation and also the following companies: Atlantic Warehouses, Incorporated, White House Coffee Company, Incorporated, Yukon Club Company, the Nalcut Coffee Company and the Packers Supply Company. (p. 88). The Kroger Grocery & Baking Company is the second largest grocery chain in the United States, operating between 5,500 and 6,000 stores. It owns bakeries and warehouses located in the different principal cities throughout the United States and owns and controls packing houses. (p. 88). It acquired the Thrift Groceries, Incorporated, the Childs Grocery Company of Indianapolis, formerly having seventy stores, the Hoosier Stores of Ft. Wayne, Indiana, operating seventy-three stores and the Foltz Grocery & Baking Company operating approximately ninety-three stores. These were acquired in approximately 1928. Kroger also acquired the Universal Grocery Company of Wisconsin, the Highland Baking Company and Piggly-Wiggly. The Illinois States Company, with approximately one hundred and fifty stores, is now a part of the Kroger interests, as is also the Memphis Piggly-Wiggly Company with sixty stores and Cox Stores, Incorporated, with a group of eighty-one stores. In 1928 Kroger acquired the entire capital stock of the Consumers Sanitary Coffee and Grocery Stores, operating three hundred stores in Chicago, and the Piggly-Wiggly Corporation. (p. 88).

Chain stores have been operated in small rural communities for the past ten years. They were originally largely confined to the big cities where the chain store development has more than doubled. It probably has quadrupled in the last ten years. Dr. P. H. Nystrom, professor of marketing in Columbia University, states that "up to 1927 chain stores had developed rapidly in the larger cities, Cleveland, Boston, Chicago, Los Angeles, Philadelphia, New York, and several other cities. More than half of all products sold through retail stores passed to the consumer through chain stores." (p. 111). There is no government survey of the situation except in eleven cities, which survey was made late in 1927 by the United States Department of Commerce and did not include any Indiana cities. This government survey showed that on the average about forty-four per cent of foodstuffs was sold through chains and in some instances more than fifty per cent of the foodstuffs in certain cities was retailed through chains. This survey would show an increase in the total sales and the percentage of trade increasing in chain stores sales. (pp. 83-84).

Generally speaking, chain stores may be divided into two types or groups. One group is represented by "shopping merchandise" and the other by "convenience merchandise." The "shopping merchandise" group is represented by such stores as Woolworth and Kresge, which usually have one central store located in a downtown shopping district and sell goods which the economist describes as "shopping merchandise" for which the purchaser will go to a central area in order to buy. The other class, including particularly food items, constitutes the "convenience mer-

chandise'' where the housewife demands a convenient location of the store, accessible in a neighborhood sense. (pp. 72-73).

Differences in the operation of a single store or unit *in a chain group* with single ownership and management and the operation of the single store *outside of a chain group* has resulted in certain clearly defined advantages to the single store in a chain group, namely:

Advantage of the Chain Store in Buying.

It has the advantage of quantity buying, making it possible to obtain goods at lower costs. This does not necessarily mean that the manufacturer is intimidated to give this lower price. It means that mass distribution makes possible, for the manufacturer, mass production which in turn lowers his unit costs and therefore, it may be mutually advantageous to the chain store and the manufacturer. This becomes possible because of the practice of the chain store to seek the source of supply—which is the producer. (pp. 121-122).

It has the advantage of underbuying by virtue of its large supply of capital, enabling cash purchases and resultant discounts. (p. 122).

It has the advantage of skill in buying. That is each store in a chain group has the advantage of highly trained and high salaried buyers the cost of which may be distributed among the entire group, thus giving each store the advantage of a highly trained management in buying at a minimum cost. (pp. 122 and 125).

It eliminates the wholesaler and performs the function of its own warehousing. (p. 122).

Advantage of the Chain Store in Large Supply of Capital.

The advantages that come from the control of an abundant supply of capital are these:

The chain can make its expansions as desired without waiting for the accumulation of sufficient earnings. It is possible to erect a warehouse where needed. It is possible to purchase smaller chains; to conduct extensive advertising campaigns; to employ the best merchandising ability and to purchase in large quantities for cash. (pp. 122-123).

Advantage of the Chain Store in Sales Promotion.

This includes advertising which is usually prepared at headquarters by skilled and expert executives, the cost of which can be distributed over all units or stores using it instead of the one store in the case of the independent store. (pp. 124 and 135).

Advantage of the Chain Store in Management.

The independent retailer depends upon the ability of the owner or owners. In the case of the chain store there is the efficient merchandising ability of a group of experts whose combined intelligence and ability constitute a more powerful force than the average independent retailer can provide, the cost of which to the single unit of the chain store group is small when distributed among all the units of the group. (p. 125).

S. S. Kresge Company Graph.

This graph (side folio 193) illustrates the percentage of increase in stores, sales and profits of said company for the period from 1909 to 1927 and shows an increase during said period in stores of 935 per cent, in sales of 2515 per cent, in profits of 5097 per cent.

The Chain Store in Civic Activities.

It was conceded that the man who both lives and has his capital invested in a community takes a greater interest in community activities than one who does not. (p. 134).

III.

SPECIFICATION OF ERRORS.

1. The District Court of the United States for the Southern District of Indiana, (Indianapolis Division) erred in overruling the appellants' (defendants below) motion to dismiss the bill of complaint.

2. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that the classification as contained in Section 5 of Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 is not reasonable and does not rest upon a ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

3. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that under the evidence in the case there are many persons and firms in Indiana doing a business similar to that of the plaintiff and having but one store with a much larger investment and a much larger gross income, who under Section 5 of Chapter 207 of the Acts of the General Assembly of Indiana of 1929 will be required to pay only three dollars annually as against $5,443.00 annually required to be paid by the plaintiff on account of his two hundred and twenty-five stores.

4. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that all persons engaged in the operation of one or more stores of mercantile establishments within the State of Indiana belong to the same class for occupation tax purposes as the plaintiff and should pay the same license fee regardless of the number of stores owned and operated by them and that any other classification is arbitrary and in violation of the constitutional rights of the plaintiff.

5. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that there is no real and substantial difference within the law granting to the state legislature the authority to classify occupations for the purpose of taxation between the person who reaches his trade through the establishment of more than one store located in various parts of a community and operated under the same general management, supervision and control, and the person who owns but one store and reaches his trade by means of delivery or by requiring his trade to call at the one store so owned by him.

6. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that a classification for the purpose of imposing an occupation tax upon the basis of number of stores operated under the same general management, supervision and control as provided in Section 5 of Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929, if enforced will deny the owner

of more than one store of the equal protection of the law as guaranteed by the Constitution of the United States and will deprive him of his rights under the Constitution of the State of Indiana.

7. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 is void and in violation of the Constitution of the United States and of the State of Indiana.

8. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in its decree in granting and issuing the injunction herein.

IV.

SUMMARY OF THE ARGUMENT.

A. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 is void and in violation of the Constitution of the United States and of the State of Indiana.

A-1. This erroneous holding was predicated upon the erroneous conclusion of the court that the classification as contained in Section 5 of Chapter 207 of the Acts of the General Assembly of the State of Indiana, *supra*, is not reasonable and does not rest upon a ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

Point 1. The taxing power of the state is one of the highest attributes of sovereignty, essential to its continued existence, and may be exercised without limitation on all property, trades and business carried on within its boundaries unless prohibited by the state or federal Constitution.

Railroad Company v. Peniston, 85 U. S. 5, at page 29;

Royall v. Virginia, 116 U. S. 592, at p. 597.

Point 2. In the exercise of its taxing power, the state, in the discretion of its legislature, may levy a privilege or occupation tax on *all occupations or business*, or it may *select* for taxation certain classes and leave the *others untaxed*.

Armour Packing Co. v. Lacy, 200 U. S. 226, at page 235;

Southwestern Oil Co. v. Texas, 217 U. S. 114, at pages 124, 125 and 126;

Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, at page 237;

American Sugar Refining Co. v. Louisiana, 179 U. S. 89, at page 94;

Hart Refineries v. Harmon, Treas., 49 Supreme Court Reporter 188, at page 189.

Point 3. In cases in which the legislature selects certain classes for taxation, the classes so selected may be further subdivided according to certain differences without violating the *due process* and *equal protection* provisions of the Fourteenth Amendment to the Constitution of the United States, if the subdivisions are reasonable.

Cooley on Taxation (4th ed.), Secs. 349-350;
Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;
Michigan Railroad Tax Cases, 138 Fed. 223, at p. 241;
Metropolitan Life Ins. Co. v. City of Paris, 138 Ky. 801, 129 S. W. 112.

Point 4. In determining whether a classification for an occupation tax is discriminating, the motives or special reasons actuating the legislature is of no concern to the court; neither is the wisdom of the classification of consequence. The determining factor lies in the answer to the question, Does the burden fall alike upon all who are in substantially the same situation?

Cooley on Taxation (4th ed.), Sec. 350;
Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;
Oliver Iron Co. v. Lord, 262 U. S. 172, at p. 179;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245, at p. 293;
Dane v. Jackson, 256 U. S. 589, at pp. 598-599;
Citizens Telephone Co. v. Fuller, 229 U. S. 322, at pp. 329-331;
McLean v. Arkansas, 211 U. S. 539, at p. 547.
Hart Refineries v. Harmon, Treas., supra.

Point 5. The imposition of an occupation tax in different amounts upon different occupations is not a denial of *due process* or *equal protection* of the laws.

Oliver Iron Co. v. Lord, 262 U. S. 172, at p. 179.

Point 6. A state does not deny *equal protection* of the laws by adjusting its revenue laws so as to favor certain industries or industries carried on in a specified manner.

Quong Wing v. Kirkendall, etc., 223 U. S. 59, at pp. 62-63;

Metropolis Theatre Co. v. Chicago, 228 U. S. 61, at p. 69.

Point 7. The classification of occupations for taxation provided by Chapter 207 of the Acts of the General Assembly of the State of Indiana of the year 1929 selects *all stores* in which goods, wares or merchandise of any kind are sold either at retail or wholesale. Such a selection is clearly not open to objection. The fact that everyone owning and operating *one store* is required to pay the *same tax irrespective of amount of business done* would not operate to strike down the law. The tax is charged for the privilege of operating one store, and so long as the tax provisions of the act operate upon all such owners and operators alike, as is the case with the act under consideration, it is not open to the objection that it violates the Fourteenth Amendment.

Sec. 1 of Chap. 207, Acts of General Assembly of Indiana, 1929;

Sec. 5 of Chap. 207, Acts of General Assembly of Indiana, 1929;

Railroad Company v. Peniston, 85 U. S. 5 at p. 29;

Armour Packing Co. v. Lacy, 200 U. S. 226 at p. 235;

Southwestern Oil Co. v. Texas, 217 U. S. 114 pp. 124, 125 and 126;

Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232 at p. 237;
American Sugar Refining Co. v. Louisiana, 179 U. S. 89 at p. 94;
Hart Refineries v. Harmon, Treas., 49 Sup. Ct. Rep. 188 at p. 189;
Cooley on Taxation, (4th ed.), Secs. 349-350;
Michigan Railroad Tax Cases, 138 Fed. 223 at p. 241;
Great Atlantic & Pacific Tea Co. v. Maxwell, Commissioner, etc., (N. C.) 154 S. E. 838;
Oliver Iron Co. v. Lord, 262 U. S. 172 at p. 179;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245 at p. 293;
Dane v. Jackson, 256 U. S. 589 at pp. 598-599;
Citizens Telephone Co. v. Fuller, 229 U. S. at pp. 329-331.

Point 8. The first store of any group under the classification made by the act in question is required to pay the same tax; the second, third, fourth and fifth stores of any group are likewise required to pay the same tax at the same numbers in any other group large or small; the sixth, seventh, eighth, ninth and tenth stores of any group are likewise required to pay the same tax as the same numbers in any other group large or small and so on. In other words, every person in the same situation with resepct to number of stores operated at different locations under the same management is required to pay exactly the same tax and the fact that a given person may operate numerous stores does not increase the tax on the first store, or on any of the remainder of the second group and so on. The

tax provision operates uniformly as to each classification and of this there can be no doubt. The burden falls alike upon all in the same situation."

Cooley on Taxation (4th ed.), Sec. 350;
Southwestern Oil Co. v. Texas, 217 U. S. 114 at p. 126;
Oliver Iron Co. v. Lord, 262 U. S. 172 at p. 179;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245 at p. 293;
Dane v. Jackson, 256 U. S. 589 at pp. 598-599;
Citizens Telephone Co. v. Fuller, 229 U. S. 322 at p. 331;
Great Atlantic & Pacific Tea Co., et al. vs. Maxwell, Com., etc. (N. C.) 154 S. E. 838.

Note: *See appendix, page 57, for method of classification.

A-2. The erroneous decision of the court below holding Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 to be void and in violation of the Constitution of the United States and of the State of Indiana is further predicated upon the erroneous conclusion that there is no real and substantial difference within the law granting to the state legislature the authority to classify occupation for the purpose of taxation between the person who reaches his trade through the establishment of more than one store located in various parts of a community and operated under the same general management, supervision and control, and the person who owns but one store and reaches his trade by means of delivery or by requiring his trade to call at the one store so owned by him.

Point 9. The classification is not arbitrary. The plaintiff below has a reason for desiring to divide his capital of $200,000, into 225 stores at different locations in preference to concentrating at one location, thus limiting the number of single proprietorships. And under the authorities the state has a perfect right to promote individual proprietorship of single stores by adjusting its revenue laws so as to favor them.

Quong Wing v. Kirkendall, etc., 223 U. S. 59 at pp. 62-63;
Metropolis Theatre Co. v. Chicago, 228 U. S. 61 at p. 69;
Alaska Fish Co. v. Smith, 255 U. S. 44;
W. W. Cargill v. Minnesota, 180 U. S. 452;
City of Los Angeles v. Los Angeles Ind. Gas Co., 93 Pac. 1006;
Singer Sewing Machine Co. v. Brickwell, 233 U. S. 304;
American Sugar Refining Co. v. Louisiana, 179 U. S. 89;
New York v. Latrobe, 49 Sup. Ct. Rep. 377;
Great Atlantic & Pacific Tea Co., et al. v. Maxwell, Com., (N. C.) 154 S. E. 838.

Point 10. The classification is not in violation of the due *process* and *equal protection* provisions of the Fourteenth Amendment to the United States Constitution.

Quong Wing v. Kirkendall, etc., supra;
Metropolis Theatre Co. v. Chicago, supra;
Southwestern Oil Co. v. Texas, supra;
Oliver Iron Co. v. Lord, supra.

Point 11. The evidence as set out in the statement of the case clearly shows a real and substantial difference between merchants who exercise the privilege of carrying on their business in this state by means of two or more stores and those who maintain and operate only one store. The tendency to monopoly by the "chain" groups, especially in food distribution in cities, fully justifies the various sub-classifications.

Point 12. Federal courts exercise great caution in interfering with the collection of revenues of the state or their municipal and public agencies.

Union Pac. R. Co. v. Lincoln County, Fed Cas. No. 14379 (2 Dill. 279);
Graham v. Du Pont, 262 U. S. 234;
Bailey v. George, 259 U. S. 16.

Point 13. If a state deems it advisable and to the best interest of its citizens to discourage a specific business and encourage another class, that is so closely associated with it as to be a part of the former, by placing a heavier license fee on the former and a lighter or no fee at all on the latter, it is valid and not an unjust and unreasonable discrimination or a palpable arbitrary classification.

American Sugar Refining Co. v. Louisiana, 179 U. S. 89;
Quong Wing v. Kirkendall, 223 U. S. 59;
Alaska Fish Co. v. Smith, 255 U. S. 44, 48, 49;
W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 469;
Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 69;

Ex parte Thornton, 12 Fed. 538, 548;
City of Los Angeles v. Los Angeles Ind. Gas Co., 93 Pac. 1006;
Singer Sewing Machine Co. v. Brickwell, 233 U. S. 304.

Point 14. A classification of occupations for taxation made by the legislature of a state which is not wholly unreasonable and arbitrary, and which is uniform in its operation on all members to which it is *made applicable*, is not violative of the equal protection guaranteed by the Federal Constitution.

Consumers' League v. Colorado, etc., R. Co., 125 Pac. 577;
Chicago, etc., R. Co. v. Arkansas, 219 U. S. 453, 466;
W. W. Cargill Co. v. Minnesota, 180 U. S. 453, 469.

Point 15. The state is sovereign mistress of her own policy in establishing classes for the purpose of raising revenue by taxation and such classification will not be set aside except where there is no rational basis for the classification.

Ex parte Thornton, 12 Fed. 538;
Singer Sewing Mach. Co. v. Brickwell, 233 U. S. 304.

Point 16. The provision of the act in question with reference to the imposition of penalties for its violation does not transgress any constitutional provision. Payment of occupation taxes may be enforced by fine if the law-making body deems it proper.

Cooley on Taxation (4th ed.) Sec 1717;
Rosenbloom v. State, 64 Neb. 342, 57 L. R. A. 922;
Leonard v. Earl, 49 Sup. Ct. Rep. 372.

Point 17. An occupation may be lawful in itself and not subject to prohibition or regulation by the State *under the police power*, and yet may be prohibited in order to compel the taking out of a license for the purpose of raising revenue.

Banta v. City of Chicago, 172 Ill. 204 at p. 219;
Cooley on Taxation (4th ed.) Sec. 1679.

A-3. The erroneous decision of the court below holding Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 to be void and in violation of the Constitution of the United States and of the State of Indiana is further predicated upon the erroneous conclusion that a classification for the purpose of imposing an occupation tax upon the basis of number of stores operated under the same general management, supervision and control as provided in Section 5 of Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929, if enforced will deny the owner of more than one store of the equal protection of the law as guaranteed by the Constitution of the United States and will deprive him of his rights under the Constitution of the State of Indiana.

Point 18. The tax imposed by Section 5 of said act operates uniformly upon all within any given class. There is no unwarranted abridgement of the rights and privileges guaranteed to the plaintiff by the Fourteenth Amendment

by the imposition of an occupation tax which operates uniformly upon all within the class to which he belongs.

American Sugar Refining Co. v. Louisiana, 179 U. S. 89 at p. 94;

Armour Packing Co. v. Lacy, 200 U. S. 226, at p. 235;

Southwestern Oil Co. v. Texas, 217 U. S. 114, at pp. 124, 125 and 126;

Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, at page 237;

Hart Refineries v. Harmon, Treas., 49 Supreme Court Reporter 188, at p. 189.

Point 19. The act in question does not violate section 23 of article 1 of the Indiana Constitution providing that,

> "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Note: See appendix page 61.

Point 20. In determining questions arising under a state Constitution, the United States courts will follow the decisions of the highest court of such state in interpreting its own Constitution.

Douglas v. Noble, 261 U. S. 165, at p. 168;

United States ex rel v. Madison County, 263 U. S. 718;

Jones v. City of Portland, 245 U. S. 217.

Point 21. The subjects and methods of taxation are legislative matters, and can not be disturbed so long as the method prescribed is applicable alike to all within the prescribed class. Corporations, individuals, wholesale and retail dealers, domestic and foreign corporations may be separately classified and taxed differently, so long as all in the constituted classes are treated alike.

Kersey v. City of Terre Haute, 161 Ind. 471, at p. 472 et seq.;
State, ex rel. Lewis, et al. v. Smith, Aud., 158 Ind. 543, at p. 546;
Gafill v. Bracken, Aud., 195 Ind. 551, at p. 560;
State v. Hammond Pkg. Co., 233 U. S. 331.

Point 22. The power to tax is essentially legislative in its character, and it is not required, under the provision of section 23 of article 1 of the Indiana Constitution that there should be such an exact exclusion and inclusion of the subjects of taxation as to meet fully the approval of the judicial mind as to what is reasonable. It is only palpable abuses of the power that the courts assume to overthrow.

Kersey v. City of Terre Haute, 161 Ind. 471, at p. 474.

Point 23. The classification for taxation in the act in question is reasonable and the operation of the law is uniform within the designated classes.

Point 24. The act in question does not violate section 1 of article 10 of the Indiana Constitution providing that:

"The General Assembly shall provide by law for a

uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes as may be especially exempted by law."

Note: See appendix page 61.

Point 25. The act in question is not a *property tax* and the above provision of the Constitution of Indiana is wholly inapplicable. The act does not impose a tax on the contents of plaintiff's stores but upon the sale or use of their contents.

Gafill v. Bracken, Aud., 195 Ind. 551, at p. 558;
Bright v. McCullough, 27 Ind. 223;
Thomason v. State, 15 Ind. 449;
Baldwin Tool Co. v. Blue, 240 Fed. 202;
Bradley v. City of Richmond, 227 U. S. 477.

Point 26. The tax is valid under the police power. The "chain store" method of distribution tends toward monopoly and has a definite relation to the general welfare in its tendency toward the destruction of individual ownership of single distribution units. The question as to whether Indiana has acted wisely in seeking to encourage individual ownership of single distribution units is primarily for the legislature and not for the courts.

Quong Wing v. Kirkendall, etc., 223 U. S. 59, at pp. 62-63;
Metropolis Theatre Co. v. Chicago, 228 U. S. 61, at p. 69;
Cooley on Taxation, (4th Ed.), Sec. 350;

Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;

American Sugar Refining Co. v. Louisiana, 179 U. S. 89, at p. 94;

Hart Refineries v. Harmon, Treas., 49 Supreme Court Reporter, 188, at p. 189.

V.

ARGUMENT.

The action herein is an attack upon the constitutionality of chapter 207 of the Acts of the General Assembly of Indiana for the year 1929. The act is assailed upon four separate grounds as follows:

It is claimed—

First. Said act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of his property without due process of law and denies to the plaintiff the equal protection of the laws.

Second. Said act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarranted abridgement of the rights and privileges guaranteed to the plaintiff by said Fourteenth Amendment.

Third. That said act is invalid because it violates section 23 of article 1 of the Bill of Rights of the Constitution of Indiana.

Fourth. That said act violates section 1 of article 10 of the Indiana Constitution.

While we think the classification made by the act in question may be and is amply justified as a police measure, we are equally confident that it may be sustained upon principle and authority as a revenue measure. If it should be

objected, however, that while partaking of the nature of a police regulation, it is also a revenue measure and partakes of the nature of a privilege tax, that would not be a valid objection to its constitutionality. The revenue obtained on account of the license required by the act is none the less legal because the act performs two functions, one a regulating and the other a revenue function.

Gundling v. Chicago, 177 U. S. 183, at p. 189.

The power of taxation is an incident of sovereignty and is possessed by the government without being expressly conferred by the people. It is a legislative power. As said by Judge Cooley in his work on Taxation (Cooley on Taxation, 3rd Edition, page 9):

> "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise or privilege, or occupation or rights. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes."

The authority to tax is distinctly legislative and under our system creating three distinct departments of government and apportioning the power between them, the judiciary is so far excluded from interfering with the legislative function that the legislative department itself does not have the power to delegate its authority to the judic-

iary. The necessity, discretion, policy or motive which may have actuated the legislature in imposing a tax is of no proper concern of the courts. Quoting again from Cooley on Taxation, 3rd Edition, page 46:

> "The legislature must therefore determine all questions of state necessity, discretion or policy involved in ordering a tax and in apportioning it; must make all the necessary rules and regulations which are to be observed in order to produce the desired returns, and must decide upon the agencies by means of which collections shall be made. 'The judicial tribunals of the state have no concern with the policy of legislation. That is a matter resting altogether in the discretion of another co-ordinate branch of the government. The judicial power can not legitimately question the policy or refuse to sanction the provisions of any law not inconsistent with the fundamental law of the state.'"

In the same connection we desire to call the court's attention to the language of Mr. Justice Strong in the case of *Railroad Company v. Peniston*, 85 U. S. 5, quoting from page 29:

> "That the taxing power of a state is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all *property, trades, business,* and *avocations* existing or carried on within the territorial boundaries of the state, except so far as it has been surrendered to the federal government,

either expressly or by necessary implication, are propositions that have often been asserted by this court." (Our italics.)

Again on page 30:

"The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State Constitution, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government."

Moreover, as said by the court in *Royall vs. Virginia*, 116 U. S. 592, at page 597:

"The payment required as a preliminary to the license is in the nature and form of a tax, and is due the state which it may demand and exact from everyone of its citizens who either will or must follow some business avocation within its limits, to which the assessment is made a condition precedent. It is an occupation tax, for which the license is merely a receipt and not an authority, * * * because it is laid and collected as revenue, and not merely as incident to the general police power of the state."

In considering the legislation under investigation in this case, it is important, therefore, that the extent of legislative power of taxation as above defined be kept in mind.

It is, of course, evident that the legislature of a state is not limited in its exercise of the power of selection of subjects of taxation to a tax on property as such. "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise or privilege or occupation or right." A tax such as the one imposed by the act under investigation is not a new method of raising revenue. The method has been adopted and upheld in numerous instances. The right to levy an occupation or privilege tax is no longer open to serious debate; and in the exercise of that right the legislature in the exercise of its discretion may select *all occupations* for taxation or it may select *certain classes* and leave other untaxed.

Thus, in the case of *American Sugar Refining Company v. Louisiana*, 179 U. S. 89, the Constitution of Louisiana *classified* the refiners of sugar *for the purpose of taxation* into (1) those who refine the products of their own plantations and (2) those who engage in a general refining business refining sugars purchased by themselves or put in their hands by others for that purpose and imposing a tax upon the latter class only. The Supreme Court held that such discrimination *did not deny* to persons and corporations doing a general refining business the *equal protection of the laws*.

In the course of the opinion the court said, quoting with approval from *Missouri Railroad Company v. Mackey*, 127 U. S. 205:

> "In *Missouri Railroad Co. v. Mackey*, 127 U. S. 205, it was said that this clause did not forbid special

legislation; 'and when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, *if all persons brought under its influence are treated alike under the same conditions.*'" (Our italics.)

The court, in the above case, also quoted with approval from *Bell's Gap Railroad Company v. Pennsylvania,* 134 U. S. 232, from which we desire to quote as follows, beginning near the top of page 237:

> * * * "The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. *It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products;* it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution. But clear and hostile discriminations against particular persons and classes,

especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt *an iron rule of equal taxation*, * * *." (Our italics.)

In the case of *Armour Packing Company v. Lacy*, 200 U. S. 226, the question was upon the constitutionality of a law of the State of North Carolina levying a tax of one hundred dollars for each county in which the business was carried on upon every meat packing house doing business in the state. It was contended by the plaintiff in error among other things (1) that the tax was forbidden by the Fourteenth Amendment to the Constitution of the United States and (2) that singling out meat packing houses is arbitrary and class legislation. One of the points urged in support of the above contentions was that it denied the equal protection of the laws to meat packing establishments by levying the tax upon them and at the same time not levying the tax upon vegetable packing houses. The Supreme Court denied both contentions and in upholding the law in the course of the opinion used the following language, on page 235:

"As we have frequently held, the state has the right to classify occupations and to impose different taxes upon different occupations. Such has been con-

stantly the practice of Congress under the internal revenue laws."

Again on the same page the court, in quoting with approval from *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540, 562, used the following language:

> "A tax may be imposed only upon certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a state could not tax any property or calling unless, at the same time, it taxed all property or all callings."

The case of *Southwestern Oil Company v. Texas*, 217 U. S. 114, involved the question of the validity of an act of the State of Texas, levying a tax upon individuals, firms, associations, or other persons owning, managing, operating or controlling for profit within the state certain specified kinds of business, including wholesale dealers in coal oil, etc.

The defendant oil company insisted that the statute was inconsistent with the Fourteenth Amendment of the Constitution of the United States because (1) it arbitrarily selected and levied upon wholesale business in coal oil, naphtha, benzine and other mineral oils a tax of from fifty to one hundred times greater than was levied by the state upon wholesale business in other articles (similar to the claim made for the appellee in the present case), and (2) it denies to the defendant the equal protection of the laws in that the penalties for violation by such dealers is greater than in the case of other wholesalers.

Upon the subject of the right of the state to classify occupations for purposes of taxation the court, among other things said, on page 121:

> "It is not questioned that the state may classify occupations for purposes of taxation. In its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same class* equality of rights. The statute in respect of the particular class of wholesale dealers mentioned in it is to be referred to the governmental power of the state, in its discretion, to classify occupations for purposes of taxation."

After reviewing the cases the Supreme Court upheld the classification made by the State of Texas in the above case, holding that "the requirement by the state that *all* wholesale dealers in *specified articles* shall pay a tax of a given amount on their occupation without exacting a similar tax on the occupations of wholesale dealers in other articles can not, on the face of the statute or by reason of any facts within the judicial knowledge of the court, be held within the meaning of the Fourteenth Amendment, to deprive the taxpayer of his property without due process of law or to deny him the equal protection of the laws; and that the federal court can not interfere with the enforcement of the statute simply because it may disapprove its terms, or question the wisdom of its enactment, or because it can not be sure as to the precise reasons inducing the state to enact it."

Before leaving the above case we desire to call the court's attention to the following pertinent language on page 126:

"The statute makes no distinction among such wholesale dealers as handle the *particular articles specified in section 9.* The state had the right to classify such dealers separately from those who sold, by wholesale, other articles than those mentioned in that section. The statute puts the constituents *of each of those separate classes* on the same plane of equality. It is not arbitrary legislation, except in the sense that all legislation is arbitrary. If it be within the power of the legislature to enact the statute, then arbitrariness can not be predicated of it in a court of law. And it can not be held to be beyond legislative power simply because of its classification of occupations. What were the special reasons or motives inducing the state to adopt the classification of which the oil company complains we do not certainly know. Nor is it important that we should certainly know. * * *"

Moreover persons of the same class, as said in Cooley on Taxation, 4th edition, section 349, "may be subdivided according to certain differences, provided the subclassification is reasonable and the tax graduated accordingly, or one or more subclasses may be exempted."

The above proposition is aptly illustrated by the case of *Michigan Railroad Tax Cases,* 138 Fed. 223, sustaining a subclassification of railroads for purposes of taxation and providing for a different method for the taxation of railroad property owned by railroad companies from that owned by individual or manufacturing establishments.

Michigan R. R. Tax Cases, 138 Fed. 223, at page 241.

The classification of occupations for taxation purposes may be so made as to favor certain industries or industries carried on in a specified manner.

The case of *Quong Wing v. Kirkendall*, 223 U. S. 59, aptly illustrates the above proposition.

The act assailed imposed a tax upon all persons engaged in the laundry business other than the steam laundry business with a proviso that it should not apply to women so engaged where not more than two women were employed. The Supreme Court upheld the law, using in the course of its opinion the following language, on page 62:

> "A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a state may carry out a policy, even a policy with which we might disagree. * * *"

Again on page 63 the court uses the following language:

> "If the state sees fit to encourage steam laundries and discourage hand laundries that is its own affair. And if again it finds a ground of distinction in sex that is not without precedent. * * *"

The case of *Metropolis Theatre Company v. Chicago*, 228 U. S. 61, is likewise in point. The legislation in question in the above case was an ordinance of the city of Chicago imposing a license fee upon places of amusement. The fee was graded according to the price of admission for single seats. If the admission was $1.00 the fee charged was $1,000; if the admission exceeded 50 cents, but was

less than $1.00, the fee was $400 and so on. It was claimed that the classification was arbitrarily discriminatory. The Supreme Court upheld the law and in the course of the opinion used the following language, on page 69:

"Regarding it as a revenue measure, complainants attack it as unreasonable in basing its classification upon the price of admission of a particular theatre and not upon the revenue derived therefrom; and to exhibit the discrimination which is asserted to result, a comparison is made between the seating capacity of complainants' theatres and the number of their performances within given periods and the theatres of others in the same respects and the resulting revenues. But these are accidental circumstances and dependent, as the Supreme Court of the state said, upon the advantages of the particular theatre or choice of its owner, and not determined by the ordinance. *It will immediately occur upon the most casual reflection that the distinction the theatre itself makes is not artificial and must have some relation to the success and ultimate profit of its business.* In other words, there is natural relation between the price of admission and revenue, some advantage certainly that determines the choice. The distinction obtains in every large city of the country. The reason for it must therefore be substantial, and if it be so universal in the practice of the business it would seem not unreasonable if it be adopted as the basis of governmental action. If the action of government have such a basis it can not be declared to be so palpably arbitrary as to be repugnant to the Fourteenth Amendment. This is the test

of its validity, as we have so many times said. We need not cite the cases. It is enough to say that we have tried, so far as that amendment is concerned, to declare in words, and *the cases illustrate by examples the wide range which legislation has in classifying its objects. To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet to be free from judicial interference.* The problems of government are practical ones and may justify, if they do not require rough accommodations—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercise which can be declared void under the Fourteenth Amendment; and such judgment cannot be pronounced of the ordinance in controversy." (Our italics.)

The basis of classification in the last case cited was the price of an admission. The total amount of sales was not at all controlling; it was the price of a single ticket, which controlled. The court pointed out that the distinction which the theatre itself made was evidently not considered as artificial and must be deemed to have some relation to the success of the business. How different is the case presented here? The appellee evidently does not consider the classification as artificial. The fact that he has divided his capital of $200,000 into 225 stores at different locations in the city of Indianapolis evidences the fact that he considers that method of doing business as having

a relation to the success of his business since otherwise he might combine his capital at one location. The insistence of the appellee upon his right to transact his business in a certain way evidences the fact that he is not transacting it in the same way as if it was all transacted at one location. If the classification which he has made for the purpose of business is not artificial and arbitrary, it is hard to see why it should be thus classed for taxation.

It will be noted that the classification made by the act in question is such as to impose identically the same tax on any given number of stores. The first store, whether a single store or belonging to a group, is always taxed the same. Thus it is with the second, the third, the fourth store, and so on. The act operates uniformly and the classification is reasonable. It is not, we submit, open to the objection that it violates the Fourteenth Amendment to the United States Constitution.

In the case of *Alaska Fish Co. v. Smith*, 255 U. S. 44, the complaint alleged that the tax would prohibit and confiscate the plaintiff's business,—manufacturing fish oil, fertilizer, fish meal and by-products from *herring* in whole or in part, and that it unreasonably discriminated against plaintiff since it levied no tax on producers of fish oil, etc., from *other* fish. The court said on page 48:

> "If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them for man, or salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it can hardly be said to be contravening a constitution that has known protective tariff 100 years.

Rast v. Daneman & Lewis Co., 240 U. S. 342, 357. Even if the tax should destroy a business it would not be made invalid or require compensation on that ground alone. Those who enter upon a business take that risk."

Again on page 49, the following:

"We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation. The case is different from those where the power to tax is limited to inspection fees and the like."

The question of importance in the case at bar is whether the legislature had any reasonable hypothesis for its distinction by reason of the license being graduated on the number of stores operated from one common head.

The fact that each of complainants' stores carries on its shelves the same articles, sells to the same public and in the same way so far as the more or less mechanical part of handling the purchased articles over the counter, ringing up the sales and waiting upon the customers is concerned,—as is the case of the single store owner, is manifestly a surface comparison, as counsel well know, and wholly ignores the fundamental and necessary difference of management; unified control; unified bulk buying with its corresponding advantages; ability to shift stocks of goods and others doubtless better known to complainant as the actuating motive which induces him to carry on his business as he does in preference to carrying it on as one store.

If the State of Indiana in the adjustment of its revenue measures saw fit to discourage the rapid and alarming increase in chain stores which it may have believed tended

toward the destruction of individual ownership of individual stores, as it may well have done under the evidence, it had the right to do so.

Quong Wing v. Kirkendall, supra;
Alaska Fish Co. v. Smith, supra.

The burden, we take it, rests upon the complainant to show the arbitrariness of the classification. If there is no difference, why, we ask, does the complainant desire to split his capital up in the City of Indianapolis into 225 stores, as he says, selling precisely the same articles in precisely the same way. If his counsel dare to answer that question they will tell the court that his reason for so doing first is that he reaches directly a larger portion of the purchasing public in proportion to the number of stores operated by him. If that were as far as the answer went there might be some basis for the argument that each of complainant's stores should rest on the same basis as every other single store. But that is only part of the answer. There would be no reason for reaching a larger proportion of the purchasing public unless he had the goods to sell and no reason for having the goods unless he could reach the larger proportion of the purchasing public. His multiple stores furnish the outlet for bulk purchasing, by which he is enabled to secure a better price. The purchasing power of every dollar is thereby increased and his corresponding profits in competition with single store ownership are enhanced. That may well account for the amazing growth of the chain store enterprise.

If the legislature might reasonably have come to the conclusion that the number of stores operated had some re-

lation to the success and ultimate profit of the business it had the right to make the classification.

Metropolis Theatre Co. v. Chicago, 228 U. S. 61.

Whether the legislation under consideration is wise, or whether the classification was one that meets with the approval of the court are of no concern in this litigation. It was very aptly said in the case of *McLean v. Arkansas*, 211 U. S. 539, 547:

> "The legislature being familiar with the local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy; or that judges may hold views inconsistent with the propriety of the legislation in question, affords no grounds for judicial interference unless the act in question is unmistakably and palpably in excess of legislative power."

A classification based on the number of stores operated is not unwarranted and arbitrary. This class of legislation has consistently been upheld in the State of Indiana. In the case of *Strange v. Board, etc.*, 173 Ind. 640, 644, the Supreme Court held that the classification of cities by their populations was not an unjust discrimination or arbitrary legislation. In the case of *Chandler Coal Co. v. Sams*, 170 Ind. 623, 627, 628, the court held that the classification of coal mines by the number of employes was not class legislation or arbitrary discrimination. The same class of legislation was upheld in *Booth v. Indiana*, 237 U. S. 391, 397. In the case of *Curdts v. South Carolina Tax Comm.*, 131 S. C. 363, affirmed 273 U. S. 669, a tax on the admission to

places of amusement was held not to be invalid as discriminatory because exempting towns of less than 2,000 population and collegiate and public school amusements and swimming pools and where the proceeds inure directly to religious, charitable, education and eleemosynary organizations or to any agricultural or industrial society.

Nor is volume of business controlling. The unreasonableness of a license tax cannot be determined by the extent of business done by a single individual or concern. Can it be said that if complainant had its many stores collected to a single location that his volume of business done in the neighborhood would continue? Does he contend that his business ability, and his experience is equal to the department store? Is he assured of less or more competition? Is he assured that he could secure as competent help and that his employes would manifest the same interest in his business? There are many things that prevent the determination of the unreasonableness of a classification by a comparison of business of a single person or concern. See *Nashville, etc. R. Co. v. City of Attalla*, 118 Ala. 362.

The registration fees charged on account of various professions such as dentists and doctors in this state have never been questioned and yet they bear no relation to the amount of business done. One may do a $25,000 per year business, another a $2,500 per year business, but both pay the same. It is well illustrated in the case of *Los Angeles v. Los Angeles Ind. Gas Co.*, 93 Pac. 1006. There a uniform tax was placed as a license tax on gas companies. There were only two gas companies, one had an investment

of $100,000 with an income of $1,500 monthly, the other had an investment of $3,500,000 and a monthly income of $125,000. The court held a tax of $100 was not invalid, saying:

> "It would probably be fairer to so graduate the license tax, but we can not as a matter of law say the distinction as to the volume of business is of itself evidence of discrimination. Similar differences exist in every case but are never sufficient to invalidate the tax."

The state has a right to impose a fine and imprisonment on the failure of the payment of a license tax. Cooley on Taxation (4th Ed.), sec. 1717.

In case of *Rosenbloom v. State*, 64, Neb. 342, 57 L. R. A. 922, the court had under consideration a law that imposed a penalty of $50.00 per day for failure to procure a peddler's license. The court held that the state had a right to exact the penalty for violation of the regulation and in the course of the opinion, said:

> "A law to provide a system of revenue would be singularly weak and inefficient if it did not make adequate provisions for the collection of taxes. In fact every revenue law does contain such provision. The usual and appropriate method of enforcing payment of a property tax is by the addition of an increased rate of interest, which is in truth a penalty, and by sale of taxed property. But payment of taxes on occupations cannot be enforced in this way, and hence the ordinary, and often the only effective method of com-

pelling payment, is by fine and imprisonment of the person on whom the tax is imposed."

Before closing the discussion upon this branch of the case, we desire to call the court's attention to the case of *Great Atlantic & Pacific Tea Company, et al. v. Maxwell, State Commissioner of Revenue,* decided by the Supreme Court of North Carolina on September 17, 1930, and reported in 154 S. E. at page 838. In that case the question before the court was the constitutionality of Section 162 of Chapter 345 of the Public Laws of North Carolina for the session of 1929. Said Section is as follows:

> "Sec. 162. *Branch or Chain Stores.* Every person firm or corporation engaged in the business of operating or maintaining in this State, under the same general management, supervision, or ownership, two or more stores or mercantile establishments where goods, wares, and/or merchandise is sold or offered for sale at retail shall be deemed a branch or chain store operator, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business of a branch or chain store operator, and shall pay for such license fifty dollars ($50.00) on each and every such store operated in this State in excess of one."

It appears that this case was very fully argued and many of the larger chain store groups were represented by counsel. In deciding that the above section was constitutional the court entered into an extensive consideration of the principles involved and to which we have already referred, and continued as follows:

"In view of the foregoing well-settled principles of constitutional law, both state and federal, applicable to the question presented for decision by this appeal, we are of opinion that there was no error in the finding and conclusion of the court below that the classification made by the General Assembly of this state, in section 162, Public Laws of North Carolina, Session 1929, of the business of maintaining and operating branch or chain stores as therein defined, exclusively for purposes of taxation, is neither unreasonable nor arbitrary; that there is a real and substantial difference between merchants who exercise the privilege of carrying on their business in this state, by means of two or more stores, and those who maintain and operate only one store, and that this difference appears on the face of the statute, without regard to the findings of fact made by the court; that the imposition of a license tax on one class, without the imposition of a like tax on the other class of merchants, is not an unjust, unreasonable, or arbitrary discrimination between the two classes, for the reason that merchants who are required to obtain licenses, and to pay the tax, have and exercise a more valuable privilege than those who are required to do neither; that, therefore, the statute is not in violation of either the state or the federal Constitution.

"The statute was enacted by the General Assembly in the exercise of a wide and comprehensive discretion vested in it as the legislative department of the state government, and is in pursuance of the well-settled

policy of the state with respect to its system of taxation. The classification in accordance with which the plaintiffs were required to pay the license taxes imposed by the statute is neither capricious nor arbitrary. *Brown-Forman Co. v. Kentucky,* 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The tax is not unreasonable or discriminatory. *Ohio Oil Co. v. Conway, supra.* The judgment must therefore be affirmed."

The decision in this case is applicable in every particular to the question now before the court and we think that the reasoning therein is sound. After all, however, what the court decided in the North Carolina case, *supra,* is not different from what this court has repeatedly said upon principle as applied to other facts. The principle announced by this court in the case of *Quong Wing vs. Kirkendall, etc.,* 223 U. S. 59, is as decisive of the questions here involved as any case could possibly be following the rule of analogy. The same may be said of the decision of this court in the case of *Metropolis Theatre Co. vs. Chicago,* 228 U. S. 61, and of *Alaska Fish Co. v. Smith,* 255 U. S. 44. The tax is not only valid as a revenue measure based upon the above authorities, but it is valid as an exercise of the police power. When it appears that in 1927 chain stores had developed in the larger cities, Cleveland, Boston, Chicago, Los Angeles, Philadelphia, New York, and several other cities so that more than one-half of all food products sold through retail stores in such cities passed to the consumer through chain stores,—when it appears that such is the fact, we think it must be apparent that that method of

distribution tends toward monopoly. To that extent it must be perfectly apparent that these stores displace individually owned distribution units. This particular method of distribution very apparently does have a definite relation to the public welfare. Even if it should appear that the chain store method of distribution results in cheaper goods to the consumer, that alone would not prove that the system is advantageous to the public welfare when it displaces the individual owner, thus requiring him to seek other means of business activity. There may be a question as to whether the system is economically sound. In fact the evidence shows that economists differ upon the question. Whatever may be said as to the wisdom or unwisdom of the legislation, the fact nevertheless remains that the question as to whether Indiana has acted wisely in seeking to encourage individual ownership of single distribution units as against the chain system, is primarily for the legislature of Indiana and not for the courts.

Cooley on Taxation, (4th Ed.) Section 350;
Quong Wing v. Kirkendall, etc., 223 U. S. 59, at pp. 62-63;
Metropolis Theatre Co. v. Chicago, 228 U. S. 61, at p. 69.

For all practical purposes, what has already been said is equally applicable to the claim that the act in question violates section 23 of Article 1 of the Indiana Constitution. We have cited, however, some Indiana cases in which the above questions were under discussion, at the same time referring to the well settled rule that this court in determining questions arising under the State Constitution

will follow the decisions of the highest court of such state in interpreting its own Constitution.

Douglass v. Noble, 261 U. S. 165, at p. 168.

As to the claim that the Act in question violates section 1 of Article 10 of the Indiana Constitution, the case of *Gafill v. Bracken, Aud.*, 195 Ind. 531, is absolutely decisive of the question in favor of the validity of the law. The above section does not apply to occupation or privilege taxes. As said by the court on page 558:

> "It is first objected that the license fees thus required to be paid constitute a tax on property, and come within the provisions of Article 10, section 1, of the Constitution of Indiana (section 193 Burns 1914), which commands that 'The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation.' In this, counsel are mistaken. A tax on the use of property for certain purposes within this state, or on the sale thereof within this state is not a property tax. The owner may continue to own his gasoline indefinitely without becoming liable for the tax, or he may remove it from the state and sell or use it anywhere else in the world, without such liability. It is not the gasoline which is taxed, but the use of it within the State. And in imposing taxes of this character, the legislative power is untrammeled, except that invidious discrimination will not be permitted."

We insist that Chapter 207 of the Acts of the General Assembly of the State of Indiana enacted at its 1929 session is valid and not open to any constitutional objection.

It is respectfully submitted, therefore, that the cause should be reversed.

JAMES M. OGDEN,
Attorney General.

JOSEPH W. HUTCHINSON,
Deputy Attorney General,

GEORGE W. HUFSMITH,
Deputy Attorney General.

V. ED FUNK,
Deputy Attorney General.

HUGH D. MERRIFIELD,
Deputy Attorney General.
Solicitors for Appellants.

APPENDIX.

CHAPTER 207 OF ACTS OF THE GENERAL ASSEMBLY OF INDIANA OF 1929.

AN ACT requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state board of tax commissioners in connection therewith, and prescribing penalties for the violation thereof.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That from and after the first day of July, 1929, it shall be unlawful for any person, firm, corporation, association or co-partnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained a license so to do from the state board of tax commissioners, as hereinafter provided.

Sec. 2. Any person, firm, corporation, association or co-partnership desiring to operate, maintain, open or establish a store in this state shall apply to the state board of tax commissioners for a license so to do. The application for a license shall be made on a form which shall be prescribed and furnished by the state board of tax commissioners, and shall set forth the name of the owner, manager, trustee,

lessee, receiver or other person desiring such license; the name of such store; the location, including the street number, of each store; and such other facts as the state board of tax commissioners may require. If the applicant desires to operate, maintain, open or establish more than one such store, he shall make a separate application for a license to operate, maintain, open or establish each such store, but the respective stores for which the applicant desires to secure licenses may all be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this act.

Sec. 3. As soon as practicable after the receipt of any such application, the state board of tax commissioners shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If, upon examination, the state board of tax commissioners shall find that any such application is not in proper form and does not contain the necessary and requisite information, it shall return such application for correction. If an application is found to be satisfactory, and if the filing and license fees, as herein prescribed, shall have been paid the state board of tax commissioners shall issue to the applicant a license for each store for which application for license shall have been made. Each licensee shall display the license so issued in a conspicuous place in the store for which license is issued.

Sec. 4. All licenses shall be so issued as to expire on the thirty-first day of December of each calendar year. On or before the first day of January of each year, every person, firm, corporation, association, or co-partnership having a license, shall apply to the state board of tax commissioners for a renewal license for the calendar year next ensuing. All applications for renewal licenses shall be made on forms which shall be prescribed and furnished by the state board of tax commissioners. No license shall lapse prior to the thirty-first day of January of the year next following the year for which such license was issued, and if, by such thirty-first day of January, an application for a renewal license has not been made, the state board of tax commissioners shall notify such delinquent license-holder thereof, by registered mail, and if application is not made for and a renewal license issued on or before the last day of February, next ensuing, the former license shall lapse and become null and void. Each such application for a renewal license shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this act.

Sec. 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile

establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fees prescribed in sections 2 and 4 of this act.

The license fees herein prescribed shall be as follows:

1. Upon one store, the annual license fee shall be three dollars for each such store;

2. Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

3. Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

4. Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

5. Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store.

Sec. 6. Each and every license issued prior to the first day of July of any year shall be charged for at the full rate, and each and every license issued on or after the first day of July of any year shall be charged for at one-half of the full rate, as prescribed in section 5 of this act.

Sec. 7. The provisions of this act shall be construed to apply to every person, firm, corporation,

co-partnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Sec. 8. The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares, or merchandise of any kind, are sold, either at retail or wholesale.

Sec. 9. Any person, firm, corporation, co-partnership or association who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense.

Sec. 10. Any and all expenses incurred by the state board of tax commissioners in the administration of this act shall be paid out of the funds accruing from the fees imposed by and collected under the provisions of this act. All money collected under the provisions of this act, less the expenses incurred in the administration of this act, shall be paid into the state treasury, monthly, by the state board of tax commissioners, and shall be added to and shall

constitute a part of the general fund. Of the funds which shall accrue to the general fund during the fiscal year ending September 30, 1929, under the provisions of this act, the sum of two hundred and fifty thousand dollars shall be transferred to the school relief fund by the auditor of state; and of the funds which accrue to the general fund under the provisions of this act during the fiscal year ending September 30, 1930, the sum of five hundred and fifty thousand dollars, and during the fiscal year ending September 30, 1931, the sum of five hundred thousand dollars, and during each fiscal year thereafter the sum of three hundred thousand dollars shall be transferred to the school relief fund by the auditor of state. The transfer of such amount from the general fund to the school relief fund shall be made on the first day of January, 1930, and on the first day of January of each year thereafter, and no part of the money so transferred shall revert to the general fund at any time. The money so transferred shall be distributed in the same manner as the school relief fund is distributed, as provided by law, except that if any portion of such fund so transferred during any fiscal year is not needed in the regular school relief fund distribution, such excess may be used to apply on deficits existing from preceding years. The term "school relief fund" as used in this section shall be construed to mean that portion of the common school fund set apart by section 3, chapter 201, of the Acts of the General Assembly of 1921 and which is therein designated as a "relief fund."

Sec. 11. The state board of tax commissioners is hereby authorized to employ such clerical assistants as may be necessary to carry out and administer the provisions of this act, and to prepare and print such blanks, forms, reports, receipts and any and all other things which may be necessary to provide for the administration of this act, and to pay any and all such expenses so incurred out of the fund collected under the provisions of this act. The sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the general fund of the state treasury not otherwise appropriated to be available upon the taking effect of this section, and to be used by the state board of tax commissioners in defraying any expenses which may be incurred in the administration and in preparing to administer this act before sufficient funds shall have been collected from license fees, as hereinbefore provided. As soon as a sufficient amount of license fees shall have been collected under the provisions of this act, the two thousand dollars hereby appropriated, or so much thereof as shall have been used, shall be returned to the general fund. Whereas, an emergency exists for the immediate taking effect of this section, the same shall be in full force and effect from and after its passage.

Sec. 12. If any section, provision or clause of this act should be declared invalid, such invalidity shall not be construed to affect the portions of the act not so held invalid.

Sec. 13. This act, except section 11, shall be in effect from and after the first day of July, 1929.

Acts of the General Assembly of Indiana of 1929, page 693.

ARTICLE 1, SECTION 23, INDIANA CONSTITUTION.

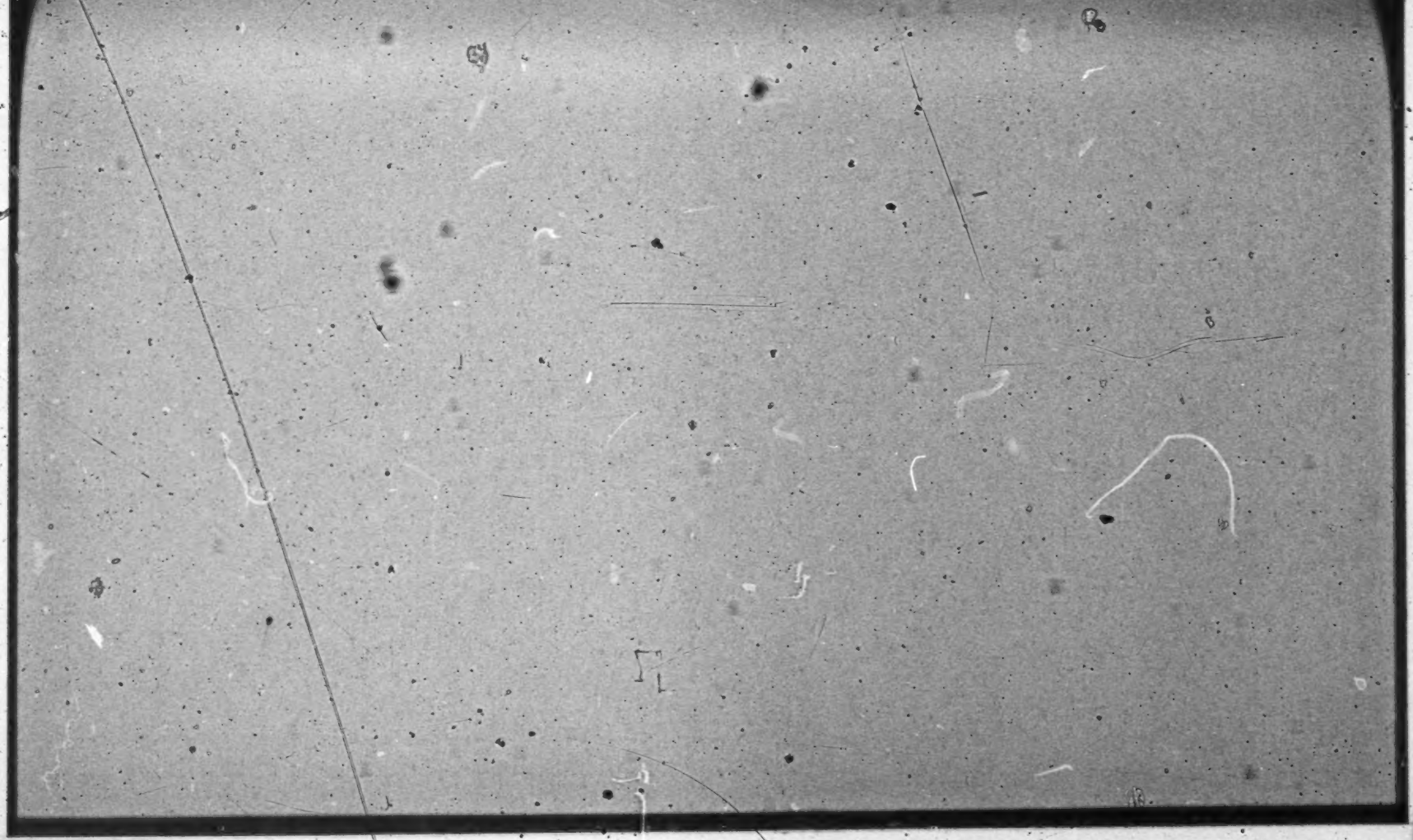
The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

Burns Annotated Indiana Statutes of 1926, Section 75.

ARTICLE 10, SECTION 1, INDIANA CONSTITUTION.

The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be especially exempted by law.

Burns Annotated Indiana Statutes of 1926, Section 200.



FILE COPY

No. 183

FILED
FEB 11 1931

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD and PHILIP ZOERCHER, as Members of the State Board of Tax Commissioners of the State of Indiana; JAMES M. OGDEN, Attorney General of the State of Indiana

Appellants

v.

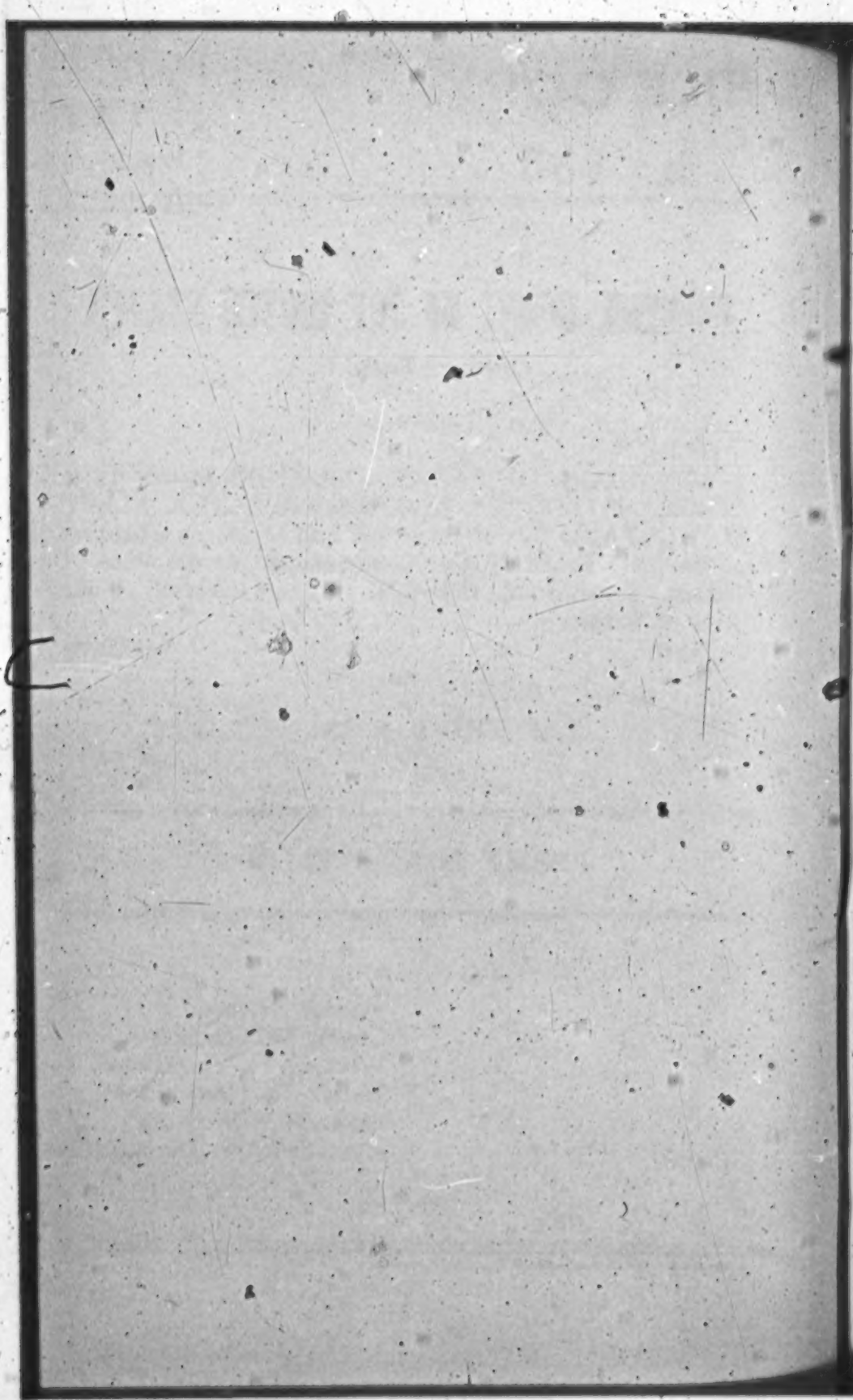
LAFAYETTE A. JACKSON

Appellee

BRIEF FOR APPELLEE

SAMUEL ASHBY
CLARK MCKERCHER
WILLIAM H. THOMPSON
HENRY H. HORNBROOK
MARTIN A. SCHENCK
Solicitors for Appellee

APPEAL PRINTING CO., 80 READE ST., NEW YORK CITY



SUBJECT INDEX

	PAGE
STATEMENT	2
The Statute	2
The Complaint	4
The Answer	4
Evidence on the Trial	5
(a) No distinction between stores based on number of locations	5
(b) No monopoly or tendency thereto. Competition keen	7
(c) Act harshly discriminatory	8
(d) Arbitrary classification. "Store," no unit of value. Number of stores under one ownership, no measure of value	10
(e) No distinction in civic relationships	11
The opinion below	12
SUMMARY OF ARGUMENT	14
ARGUMENT	16
POINT I.—The Act violates the rights of appellee under the Fourteenth Amendment. The court below properly held that the Act could not be sustained upon the theory of the exercise of the police power	16
A. Facts supporting conclusion of court below that the Act does not relate to public health, public welfare, public morals or public safety and cannot be sustained as an exercise of the police power	17

PAGE

B. That police power is not involved is deducible from the text of the Act 18

C. Mere ownership of stores, irrespective of commodity sold, is not a business affected with a public interest 19

D. The arbitrary discriminations of the statute have no relationship to any anticipated evil.. 26

POINT II.—"Store" is no unit of value nor is "number of stores under one ownership" any measure of value.

The Court below properly held that the Act as a tax statute rested on no reasonable classification having any relation to taxation and in its arbitrary discrimination against a character of store ownership violates the Fourteenth Amendment 32

POINT III.—The Court below properly held that the Act deprives appellee of rights guaranteed him under the Constitution of the State of Indiana ... 45

POINT IV.—That ownership in chain stores threatens no detriment to the public has herein a factual basis of record. The decision below should be affirmed 48

APPENDIX.—Act of Indiana General Assembly, approved March 16, 1929 (Acts 1929, Chapter 207, page 693) 50

Article 1, Sec. 23, Indiana Constitution 56

Article 10, Sec. 1, Indiana Constitution 56

Cases Cited.

	PAGE
Adams *v.* Tanner, 244 U. S. 590	18
Alaska Fish Co. *v.* Smith, 255 U. S. 44	44
Barbier *v.* Connolly, 113 U. S. 27	23
Bethlehem Motors Co. *v.* Flynt, 256 U. S. 421	40
Bright Natl. Bank *v.* Hartman, 61 Ind. App. p. 440, at p. 447	46
Burnes Natl. Bank *v.* Duncan, 265 U. S. 17	31
Chalker *v.* Birmingham & N. W. Ry. Co., 249 U. S. 522	40
Chicago G. & W. Ry. *v.* Kendall, 266 U. S. 94, 100	49
City of Chicago *v.* Netcher, 183 Ill. 104	23
City of Danville *v.* Quaker Maid, Inc., 211 Ky. 677	41
Engel *v.* O'Malley, 219 U. S. 128	30
Fairmont Creamery Co. *v.* Minnesota, 274 U. S. 1	27
Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204	37
Frost *v.* Corporation Commission, 278 U. S. 515	33
Great Atlantic & Pacific Tea Co. *v.* Doughton, 196 N. C. 145	25
Great Atlantic & Pacific Tea Co. *v.* Maxwell, 199 N. C. 433	25
Gulf, Colorado & Santa Fe Ry. *v.* Ellis, 165 U. S. 150	31
Hanover Insurance Co. *v.* Harding, 272 U. S. 494	40
Kansas City So. Ry. *v.* Road Imp. Dist., 256 U. S. 658	41
Lawton *v.* Steele, 152 U. S. 133, 137	18
Liggett Co. *v.* Baldridge, 278 U. S. 105	28, 48
Louisville Gas Co. *v.* Coleman, 277 U. S. 32	37
Metropolis Theatre *v.* Chicago, 228 U. S. 61	42
O'Gorman & Young *v.* Hartford Fire Ins Co., U. S. , decided Jan. 5, 1931 (Adv. Sheet No. 5, p. 162)	49
People *ex rel.* Farrington *v.* Mensching, 187 N. Y. 8	42
Powell *v.* Pennsylvania, 127 U. S. 678	47

PAGE

Quaker City Cab Co. *v.* Penna, 277 U. S. 389 35
Quong Wing *v.* Kirkendall, 223 U. S. 59 44

Royster Guano Co. *v.* Virginia, 253 U. S. 412 41

Schlesinger *v.* Wisconsin, 270 U. S. 230 36
Shuman *v.* City of Fort Wayne, 127 Ind. 109 45
Southern Railway Co. *v.* Greene, 216 U. S. 400 39
State *v.* Loomis, 115 Mo. 307, 314 31
State *ex rel.* Wyatt *v.* Ashbrook, 154 Mo. 375 24
Stratton *v.* St. Louis Southwestern Ry. Co., 282 U. S. 10 49

Truax *v.* Raich, 239 U. S. 33 22
Tyson & Brother *v.* Banton, 273 U. S. 418, 443 .....18, 20

Williams *v.* Standard Oil Co., 278 U. S. 235 25
Wolff Packing Co. *v.* Industrial Court, 262 U. S. 522 21

Yu Cong Eng *v.* Trinidad Collector, 271 U. S. 500 ... 30

STATUTES AND TEXTBOOKS CITED.

Burns Revised Statutes, 1926 Ed., Secs. 4636-4668 ... 18
Cooley, Law of Taxation, 2nd Ed., p. 235 47

Supreme Court of the United States

OCTOBER TERM, 1930.

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD and PHILIP ZOERCHER, as Members of the State Board of Tax Commissioners of the State of Indiana; JAMES M. OGDEN, Attorney General of the State of Indiana,

Appellants,

v.

LAFAYETTE A. JACKSON,

Appellee.

BRIEF FOR APPELLEE.

This appeal is by the defendants below from a decree of the District Court entered 15 February, 1930 (Rec. p. 65) enjoining the enforcement of Chapter 207 of the laws of the General Assembly of Indiana for 1929 imposing a graduated tax on all stores owned or operated in Indiana, commonly called the "Indiana Chain Store Act."

The action was commenced by Lafayette A. Jackson, of Indianapolis, Indiana, doing business under the firm name of Standard Grocery Company.

After overruling of motion to dismiss (p. 32) a three-judge court was organized as provided in Section 266 of the Judicial Code, and a temporary injunction was issued (p. 54). Answer was then interposed, and final hearing was had before SPARKS, Circuit Judge, and BALTZELL and SLICK, District Judges. Both sides introduced a substantial amount of testimony at this final hearing.

The opinion of the Court, per BALTZELL, D. J., is printed at pages 51-65 of the record and is reported in 38 Fed. (2d) 652.

The Court below held: First, that the Act in question had no relation to public health, public welfare, public morals or public safety and could not be sustained under the police power, and Second, that as a revenue measure the classification contained in the Act was arbitrary; that the Act was in violation of the plaintiff's constitutional rights under both the Constitution of the United States and of the Constitution of Indiana.

The brief for appellants does not adequately set forth the facts upon which the decision below was based.

Statement.

Appellee, a merchant resident in Indianapolis, keeping store through 225 stores in the city, has been taxed under the Act 1,800 times as much as other merchants carrying on the same business of the same size in the same city.

The Statute.

The title describes the Act as a licensing statute for the operation of stores.

Section 1 makes it unlawful for any person, firm or corporation, either foreign or domestic, to operate *any store* without first having obtained a license.

Section 2 requires application to be made for a license to conduct a store, the application to state the name of the store *and the location.* If the applicant desires to operate "more than one such store," a separate application must be made to obtain a license for "each such store" but the respective stores for which the applicant desires a license may be listed on one blank.

Section 5 provides that every person operating or maintaining "one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership," shall pay annually license fees graduated to the number of stores under the same management. The license fees prescribed are:

> Upon one store—"$3 for each such store."
> Upon two stores or more, but not to exceed five stores,—"$10 for each such additional store."
> Upon each store in excess of five, but not to exceed ten,—"$15 for each such additional store."
> Upon each store in excess of ten, but not to exceed twenty,—"$20 for each such additional store."
> Upon each store in excess of twenty,—"$25 for each such additional store."

By Section 7, the provisions of the Act apply to every person, firm, corporation, copartnership or association, either domestic or foreign, "which is controlled or held with others by majority stock ownership or ultimately controlled or *directed by one management* or association of ultimate management."

The Act, by definition, classifies under the term "store," all store management regardless of the number of separate store locations, Section 8 in this respect being:

> "The term 'store' as used in this act shall be construed to mean and include *any store or stores* or any mercantile establishment or establishments

which are owned, operated, maintained or *controlled by the same person*, firm, corporation, copartnership or association, either domestic or foreign, in which *goods, wares; or merchandise of any kind*, are sold, either at retail or wholesale."

The discrimination is thus against *store ownerships* regardless of the merchandise sold, depending solely upon the number of store locations. The license fee for the identical store may be $3 or $25, depending solely upon what other stores its proprietor owns or controls.

The complete text of the Act is printed as a footnote to the opinion below at page 51 of the record, and, in somewhat more convenient form, is also printed in an appendix hereto.

The complaint.

The complaint alleged that plaintiff conducts as an individual 225 stores in Indianapolis with more than $200,000 invested therein and with annual sales in excess of $1,000,000; that under the statute, plaintiff would be required to pay a license tax of $5,443, whereas there are a large number of persons in similar business with larger amounts invested and larger volume of business in *one store than in all plaintiff's stores together* who would be required to pay a license fee of $3 (pp. 3, 10); that there are more than 500 persons in Indiana selling varieties of merchandise, similarly situated on whose behalf the suit is brought (p. 4) and that the statute violates plaintiff's rights, in itemized respects, under both the state and federal constitution (pp. 11-14).

The answer.

Certain allegations and admissions of the answer are important.

The answer asserts that the classification made in the statute "is a legal and proper exercise of the police power, to prevent and curtail a practise conceived to be promotive of monopoly" (p. 39).

The answer contends that plaintiff's stores and all similar stores "are affected with a public interest" in that said stores are selling to the public articles generally used by the public (p. 43).

The answer alleges that the Act "is, *in part* a tax measure" and admits that it "has no immediate relation to the public health, public morals or public safety," but asserts that it is a regulation to "discourage monopoly of retail and wholesale trade generally throughout the State of Indiana" and asserts that "the plaintiff's stores, and *all stores similar thereto* in method of operation and management as well as *ownership*, are *affected with a public interest* in that said *stores are selling* to the public generally the necessities of life, food stuffs, and *articles generally used or consumed by the public*" (Rec. p. 43).

The answer admits that the plaintiff for thirty years has been a resident of the City of Indianapolis (p. 36), and conducts his business as an individual operating his stores in a number of different locations in the City of Indianapolis (p. 37).

Evidence on the trial.

(a) *No distinction between stores based on number of locations.*

Defendants' witness testified to the "advantages" which chain stores had in respect of capital, experience, skill, quantity buying and "insistence upon better methods of treatment of the public so as to meet the needs of the consuming public" (pp. 121-129). They are "good qualities." The general effect is to lower prices but "Every

advantage that I have spoken of as relating to the chain group is that which inheres, primarily, in volume and management *without respect to whether it is involved in a chain group or in a single store*" (p. 130).

It does not relate to form of organization—whether administering 50 or 100 or 1 (p. 130).

In this connection, William A. Rawls, Dean of the School of Commerce and Finance of Indiana University, *a witness for appellants*, testified (p. 131):

> "Q. *The fact that it is administering multiplely owned stores has nothing to do with it*, but it is the fact that it is administering a large business that develops the situation that you have referred to? A. *That is true.* But I might add that the management of a large number of stores may contribute to the more rapid increases in the size.
>
> "Q. Just as the manager of a large unit store, with many departments, may develop the ability to strengthen and enlarge those departments? A. Yes.
>
> "Q. And the problem would be identical, wouldn't it in the case of Macy or Gimbel—or, taking it locally, in connection with Ayres, or Block? A. *Yes, I would say the problem would be the same. There is no difference in the functions that are performed here—the function of retailing.*"

And Gisler, a wholesale grocer and secretary of the Indiana Wholesale Grocers Association, also a witness for appellants, testified (p. 137):

> "Q. If sales were increased in the individual unit stores, you would have the same results, would you not? A. Yes, you would."

The record further establishes that none of the elements of successful merchandising is peculiar to operations of branch stores as distinct from operations of a single store (pp. 73, 102).

The same type of merchandise is carried in chain stores as is carried in unit stores (p. 74).

The use of the automobile and good roads have had a tendency to allow the customer to go farther to shop; the chain store thus preserves the small community as a trading center, not only for itself but for other retailers (p. 111).

(b) *No monopoly or tendency thereto. Competition keen.*

There is no suggestion in the record that there is any monopoly, or danger of monopoly, in the State of Indiana in any article or product sold in chain stores or among the "goods, wares, or merchandise of any kind" sold in stores.

There is no proof of any monopoly of an idea or method of store management. The tendency is not toward monopoly but toward development of successful merchandising. Chain store development is analogous to the earlier department store development, and to the mail order development which in 1900 and 1908 respectively caused similar prejudice on the part of competitors (pp. 106, 107).

There are 44,027 retail stores in Indiana; 1,594 chain grocery stores; 8,486 grocery stores not in chains; 1,094 drug stores of which 99 are chain drug stores. The chain retail stores represent less than 8% of the total stores in Indiana (p. 82, 83).

Of 1,500,000 retail stores in the whole country, less than 150,000 are operated by chain store groups; and these chain stores are operated by 8,000 different chain store groups. The competition between them is intense. There is no federation between them looking toward monopoly or suppression of competition (p. 72). The competition met by appellee is very keen (p. 120).

Of the retail stores of the country, approximately 63% are independent or unit stores; 16% are department

stores; 12% are chain stores; and 4% are mail order houses (pp. 100, 101). Competition has been open, and there is no tendency to develop into any monopoly (p. 105).

P. H. Nystrom, Professor of Marketing at Columbia University, testified:

> "I have not found anything in my study which indicates a tendency on the part of chain stores to develop into a monopoly in this country or to be inimical to the general public welfare" (p. 105).

The competition between chain stores and the larger group of independent or unit stores has lowered prices to the public (p. 106). And defendants' expert spoke of "the competition that chain stores have among themselves as well as the keener competition of the better independent stores" (p. 124).

All merchandising has undergone great changes during the last 50 or 80 years (p. 84). The retail trade in small communities has been declining for 30 years and long before the chain stores appeared in them (p. 110). Generally speaking the chain store in the smaller communities has stimulated business in such communities (p. 111).

The rate of failures in unit stores has not varied more than a fraction of one per cent. during the past five years (p. 82).

There are many instances, some of which are given in the record, of chain stores in Indiana failing (p. 84).

(c) *Act harshly discriminatory.*

The record gives instances of different stores doing a much larger business than the plaintiff in the City of Indianapolis and required to pay a tax of only $3 as contrasted with the plaintiff's tax of $5,443.

L. S. Ayres & Company operates 124 separate departments in its store, which is conducted from a single location. Its total volume of business is more than $8,000,000 per year (pp. 81, 116). Its license fee is $3.

William H. Block & Company operates 86 separate departments in one location in the City of Indianapolis. Its total business is more than $8,000,000 per year (pp. 81, 115). Its license fee is $3.

This business is highly competitive with the business of the chain stores.

Persons owning a greater number of stores with more money invested in a business similar to that of the plaintiff but with one store in Indiana, will pay only $3. The Lerner Shops operate 145 stores, with one store, however, in Indiana. A. G. Spaulding Company operates 54 stores, with one store in Indiana. National Shoe Shops, Inc., operate 72 stores, with one store in Indiana (p. 82). Their license fees are $3.

Large numbers of stores independently owned and controlled are in associations or "voluntary chains" under which co-operative buying is conducted for the group.

In the United States, in the food field there are a larger number of retail stores grouped for co-operative buying in "voluntary chains" than there are retail outlets operated by chain store companies (p. 75). There are several hundred grocery stores in Indiana using the service of the Independent Grocer's Alliance (p. 89). L. S. Ayres, a large department store is in a co-operative group (p. 95). There are co-operative groups to a great extent in the drug trade (p. 95).

These independently owned units—members, nevertheless, of such co-operative associations—are, under the Act, required to pay a license of only $3.

(d) *Arbitrary classification. "Store," no unit of value. Number of stores under one ownership, no measure of value.*

One store with an inventory of $3,500, doing a business of $24,000 may have 7 turnovers a year, whereas another with $3,000 inventory may do a $115,000 business, with 37 turnovers (p. 94).

The largest store in Indianapolis is a unit store, belonging to a co-operative group of 17 department stores (p. 103).

The small grocery store has, according to defendants' witness, been the dumping ground for those who didn't have anything else to do. A farmer, a retired man, or a widow buys a grocery store and tries to make a living. No question of efficiency seems to have entered into the matter (p. 137).

The unit store is in many instances in co-operative groups for co-operative buying, and group advantages (p. 76).

Chain stores operate in many fields: food stores, clothing, women's ready to wear, boots and shoes, dry goods, auto supplies, practically every line (p. 72). They have the same variation as the single store in the selection of items (p. 74).

There are two general types of chain store: the "shopping merchandise," as Woolworth and Kresge, usually having a central store in a down town shopping district; and the "convenience merchandise" where the housewife demands a convenient location, accessible in a neighborhood sense (pp. 72, 73).

The mere addition of a new unit or store to an existing group of chain stores does not increase the sales more than arithmetically. It is in reality less than arithmetically, because of limiting factors (p. 76). The additional

unit has its own group of expenses (p. 77). The volume of sales of the group to which it is added is not increased (p. 105).

(e) *No distinction in civic relationships.*

A. H. Gisler, secretary of a large wholesale grocery in Indiana, who was one of appellants' witnesses, said (R. p. 134):

> "I have found that civic movements in a community have generally been entered into by the chain store operators in that community and increasingly in the ratio to the increase in chain store management as shown in that community."

Again, this witness said (R. p. 137):

> "The civic spirit in a community varies with practically every individual. There are troubles in every community over this man or that man who does not respond to the demand for civic spirit. In its essentials it reverts to types of men and individuals. We find people responding to civic spirit in self-interest, by compulsion or the desire to be helpful. This is true of every community with or without chain stores."

Appellants, at page 13 of their brief erroneously state that on the trial "it was conceded that the man who *both* lives and *has his capital invested* in a community takes a greater interest in community activities than one who does not" (p. 134). The concession in reality was "that a man who lives in a community takes a greater interest in community affairs" (p. 134).

On appellants' evidence it varies with each individual (p. 137).

The opinion below.

The opinion herein was rendered before Equity Rule 70½ (promulgated 2 June, 1930, to take effect 1 October, 1930), but states the grounds of decision, the facts of the record and the conclusions. Thus the court below, in the first part of its opinion considers the rules for determination as laid down by this Court. It then considers the practical operation of the Act and its effect and makes what are in the nature of fact findings on the evidence. The last part of its opinion involves the conclusions of invalidity.

1. The Court held that the Act could not be sustained upon the theory of an exercise of the police power inasmuch as it did not relate to the public health, the public welfare, the public morals or the public safety (pp. 54, 55).

2. As a revenue measure, the Court considered the rules for determination laid down by this Court in a number of cases:

(a) that clear and hostile discriminations against persons and classes, especially if of an unusual character, might be obnoxious (p. 56);

(b) that classification must rest upon some ground of difference having a fair and substantial relation to the object of legislation. The Legislature cannot arbitrarily select a certain class of persons for taxation and justify its acts by calling it classification (p. 57);

(c) mere difference is not enough (p. 59);

(d) the practical operation of the Act is to be regarded and dealt with according to its effect (pp. 59, 60).

3. The Court then found on the evidence:

(a) That it could not be disputed that the amount of the taxes to be paid by the plaintiff is determined

"not by the amount of capital invested, the amount of sales, or the value of such business, but solely by the number of stores owned by him" (p. 60).

(b) That plaintiff owns 225 grocery stores all in the City of Indianapolis with a capital investment of approximately $200,000. The annual gross sales are in excess of $1,000,000. He will pay a total tax of $5,443 annually (p. 60).

(c) That under the evidence many firms in Indiana having larger sums invested, and larger gross incomes but business similar to plaintiff will pay a tax of only $3 annually (p. 60).

(d) That the evidence also discloses that other persons owning a greater number of stores, with larger sums of money invested and much larger gross income and in similar business but with only one store in Indiana, will be required to pay a tax of only $3 annually (pp. 60, 61).

(e) That the testimony was in detail from plaintiff and defendants and gave a general history of the original and growth of the "chain store." *"The Act in question is evidently intended to levy a heavier occupational tax upon the owners and operators of so-called 'chain' stores than that levied upon the owners and operators of a single store"* (p. 61).

(f) That the evidence discloses that there are 44,000 retail stores in Indiana of which 8% are chain stores (p. 61).

(g) That the fact is, as shown by the evidence, that competition between "chain store" operators is very active and aggressive (p. 61).

(h) That one store owner may take more interest in civic affairs than another; there is no universal rule on the subject; plaintiff is a resident, citizen and taxpayer of Indianapolis in which all his stores are situated. Relative civic interest does not constitute separate classes for tax purposes (p. 62).

(i) That the inequality based solely on the number of stores owned was apparent (p. 64).

(j) That the mere fact that one person reaches his trade by more than one store does not place him in a different class from the person who has one store and reaches his trade by delivery (p. 64).

(k) That there is no real and substantial difference between such persons granting the legislature the authority to classify occupations for tax purposes (p. 64).

(l) That the difference is simply in the detail in which the business is conducted and does not create a different class (p. 64).

4. The Court then concluded that the classification if enforced, would deny the owner of more than one store the equal protection of the law as guaranteed by the Constitution of the United States and would deprive him of his rights under the Constitution of Indiana; that the classification was not reasonable and did not rest upon a ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced would be treated alike; that it is arbitrary (pp. 64, 65).

SUMMARY OF ARGUMENT.

I.

The Act violates the rights of appellee under the 14th Amendment. The court below properly held that the Act could not be sustained upon the theory of the exercise of the police power.

(a) The facts found support the conclusion of the court below that the Act does not relate to public health, public welfare, public morals or public

safety, and cannot be sustained as an exercise of the police power.

(b) That police power not involved is deducible from the text of the Act.

(c) Mere ownership of stores, irrespective of commodity sold, is not a business affected with a public interest.

(d) The arbitrary discriminations of the statute have no relationship to any anticipated evil.

II.

"Store" is no unit of value nor is "number of stores under one ownership" any measure of value.

The court below properly held that the Act, as a tax statute, rested on no reasonable classification having any relation to taxation and in its arbitrary discrimination against a character of store ownership, violates the 14th Amendment.

III.

The court below properly held that the Act deprives appellee of rights guaranteed him under the Constitution of the State of Indiana.

IV.

That ownership in chain stores threatens no detriment to the public has herein a factual basis of record. The decision below should be affirmed.

ARGUMENT.

POINT I.

The Act violates the rights of appellee under the Fourteenth Amendment. The court below properly held that the Act could not be sustained upon the theory of the exercise of the police power.

Appellants in their brief herein urge that the Act is justified as a police measure in tending to discourage a tendency toward monopoly in a method of distribution and thus encouraging ownership in unit stores. It is said to perform a regulatory function (Appellants' Brief, pp. 7, 22, 27, 30). And the answer herein likewise asserts that the Act has its justification in the police power "to prevent and curtail a practise conceived to be promotive of monopoly" (p. 39). The monopoly is alleged to be "of retail and wholesale trade generally throughout the State of Indiana" (p. 43). And the power to regulate is sought to be predicated upon the claim asserted in the answer that *all stores* similar to plaintiff's in operation or *in ownership* "are affected with a public interest" in that they sell to the public necessities of life, foodstuffs *"and articles generally used or consumed by the public"* (p. 43).

The answer admits that the Act "has no immediate relation to the public health, public morals or public safety" but claims a relation to the public welfare in the respects above mentioned (p. 43).

A.

Facts supporting conclusion of court below that the Act does not relate to public health, public welfare, public morals or public safety and cannot be sustained as an exercise of the police power.

The record establishes that there is no distinction in method of operation or manner of ownership which is the subject of monopoly on the part of branch or chain stores as distinguished from unit stores; that methods of buying and distribution are freely selected by merchants; that group purchasing is not limited to large businesses but is open to the small merchant through voluntary chain or co-operative associations; that defendants' witnesses testified that there was no function of retailing and no commodity peculiar to chain stores (Rec. pp. 73, 74, 121-129, 130, 131, 137).

Detailed statistics show that chain stores in Indiana are in a small minority compared with unit stores, and that throughout the country the minority as measured by the volume of business done is smaller than department stores (Rec. pp. 72, 82, 83, 100, 101).

Not only is there no evidence in the record of any monopoly of method, ownership or commodity, but there is uncontradicted evidence that trade is free, that competition is open and keen, and that there is no federation between chain stores (Rec. pp. 72, 105, 124). The competition has lowered prices to the public (p. 106).

The court below found that stores in "chains" are approximately 8% of the retail stores in Indiana and that competition between "chain store" operators is "very active and aggressive" (p. 61).

B.

That police power is not involved is deducible from the text of the Act.

The Act, although admittedly directed against chain stores does not mention them. It does not mention any monopoly in idea, method of business, ownership or commodity. It contains no regulation or prohibition. Stores selling foodstuffs, the rarest jewels, the more dangerous drugs, or firearms are in the same class under it as those dealing in patented articles, sporting goods or books. The discouragement of anonymous monopoly in anonymous method or product cannot be suspected as its object particularly when Indiana has an entirely adequate statute in customary form against monopolies (Sections 4636-4668, Burns Revised Statutes, 1926 Edition). And of course there can be no inference that there is any monopoly in *all* goods, wares and merchandise, being sold wholesale and retail in the State of Indiana.

It is not permissible to spread such an all-inclusive net against all storekeeping, with meshes so devised that there is no conceivable appropriate legal effect. No interest of the general public, as distinguished from a particular class can justify the imposition of this unusual and unnecessary restriction upon lawful business.

Lawton v. *Steele*, 152 U. S. 133, 137;
Tyson & Brother v. *Banton*, 273 U. S. 418, 443;
Adams v. *Tanner*, 244 U. S. 590.

C.

Mere ownership of stores, irrespective of commodity sold, is not a business affected with a public interest.

The Act defines the term "store" as "any store or stores" owned or operated by the same person or corporation, "in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale." *All, by definition, are of the same class.* The discrimination, however, is levelled against the number of stores in one management and is graduated against the number. It is thus the character of the ownership of all stores, in all commodities, which is proposed to be discriminated against.

A store is taxed at one rate if it is the sole store owned by one management. The same store is taxed at an entirely different rate if it is owned by a management *which also owns other stores.* Stores identical in character owned by one management are taxed at different rates.

The defendants' answer pleads that all stores similar to the plaintiff's "in method of operation and management as well as *ownership,* are *affected with a public interest* in that said stores are selling to the public generally the necessities of life, foodstuffs, and *articles generally used or consumed by the public*" (p. 43). And all appellants' arguments when analysed in their legal categories will be seen to be predicated upon this contention that because of this claimed element the state may thus regulate under the police power or regulate by discriminatory burdens under the tax power.

The legislation, from the standpoint of attempted regulation, is unprecedented in that *all storekeeping in all commodities,* wholesale and retail, is sought to be brought within the regulatory power of the Legislature. No

special circumstances are indicated justifying this extraordinary attempt to regulate all storekeeping, and, through harsh burdens, to discourage or stamp out a particular character of store ownership. The extreme character of the legislation is emphasized by appellants' attempted justification of the Act in question as a price affecting statute to discourage the chain store owner to the encouragement of the unit storekeeper (Appellants' Brief, p. 27). For it is only by compelling a raising of the sales price of chain store goods that the unit storekeeper can get his statutory "encouragement" in competition therewith.

In *Tyson & Brother* v. *Banton*, 273 U. S. 418, this Court, per SUTHERLAND, J., said in this connection, at pages 429-30:

> "*The power to regulate property, services or business can be invoked only under special circumstances;* and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all.
>
> "The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 246, but *exists only where the business or the property involved has become 'affected with a public interest.'* "

Certainly no tendency toward monopoly in chain storekeeping, or in all goods, wares, or merchandise, or in any unspecified goods, wares or merchandise, can be advanced as justification for the attempt on the part of the Indiana Legislature to decree the character of the ownership of all storekeeping. No monopoly can exist in manner of store ownership.

In *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, this Court held violative of the Fourteenth Amendment an act of Kansas fixing wages in a packing house. TAFT, Ch. J., at pages 537-8, said:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays *one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.*
>
> "An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes, *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 320; *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 256, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, it usually distinguishes private from *quasi*-public occupations."

and further, at page 538:

> "There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are countrywide, a short supply is not likely, and the danger from local monopolistic control less than ever."

In *Truax* v. *Raich*, 239 U. S. 33, the Arizona Act requiring any employer of more than five workers to employ not less than 80% qualified electors or native-born citizens, was held unconstitutional. This Court, per HUGHES, J., said at page 40:

> "The discrimination here involved *is imposed upon the conduct of ordinary private enterprise.*"

and further, at page 41:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 590; *Coppage* v. *Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

and further, at page 43:

> *"No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to every sort.* The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law."

Appellants urge (their brief, p. 23) that the classification is "uniform in its operation on all members to which it is made applicable." But so was the discrimination

against aliens in the above case. All aliens were treated alike. Uniformity of discrimination is no justification.

The Act in the case at bar is as arbitrary as would be a tax on all merchants graduated against the number of hats they owned—to the encouragement of the "one hat man."

In *Barbier* v. *Connolly*, 113 U. S. 27, this Court said, at page 31, that the Fourteenth Amendment intended "that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

Some thirty years ago several instances occurred of legislation discriminating against the particular method of storekeeping known as the "Department Store"; and it was attempted, by legislation, to prohibit or discourage the sale of general articles of merchandise in one location, just as in the case at bar, the attempt is made to discourage the sale of such articles at separate locations. The vice of the legislation it will be observed, however, was the same, namely, a discrimination against a character of store ownership.

In *City of Chicago* v. *Netcher*, 183 Ill. 104, the statute levelled at department stores, prohibited sale of certain classes of goods in the same store in which were sold certain other classes, none being harmful in themselves. The Court held it void as a purely arbitrary interference of rights guaranteed by the United States Constitution, at page 111 saying:

> *"General stores have always dealt in all kinds of merchandise, and no one has ever imagined that the comfort, safety or welfare of the public was in any manner or to any extent injured or prejudiced*

> *by them.* Public health and public comfort are in no way affected by selling the different kinds of merchandise enumerated in different departments of the same building, and would not be if the same clerk should sell them; nor would the public welfare or comfort be increased by compelling a customer to buy one kind of merchandise in one store and another in some other store. * * * It is a mere attempt to deny a property right to a particular class in the community where all other members of the community are left to enjoy it."

In *State ex rel. Wyatt* v. *Ashbrook*, 154 Mo. 375, an Act of Missouri classifying department stores separately for the purpose of license taxation and imposing upon them greater burdens than those imposed on other classes of merchants was held unconstitutional. The act made it unlawful to sell goods of more than *one group or class under one management*, without obtaining a license for which a tax was to be paid.

The Court held that it would look beyond the mere title to determine its real object, and said at page 385:

> "In no sense can this most extraordinary act be regarded as a police measure, and consequently it does not fall within the protection of the police power. It nowhere attempts to protect any public interest or defend against any public wrong. It shows upon its face that regulation is not its purpose, but that revenue, or undue restriction, in the interest of others not embraced in the class designated, is the aim in view."

The Court, at page 386, stated that it could not conjecture why the selling of articles of merchandise in one store under one unit of management affected the public in any manner different or greater than would result if the same articles were sold "in different store buildings

run by the same person, corporation or company as independent establishments." If the selling of the articles enumerated was innocent and harmless when pursued separately as a business it did not become harmful when "united for sale under one unit of management and conducted in one building." "Such grouping together for sale or disposition of those articles of daily use and necessity do not endanger or threaten the peace and good order of society."

The Court held, at page 392, that the Constitution had been violated by the arbitrary and unreasonable classification of merchants of a natural class for the particular purpose of the imposition.

The Court concluded, at page 396:

> "It is truly 'classification run wild.' It is special legislation unrestrained. To have made the act apply to all merchants of a given avoirdupois or to those employing clerks of a designated stature, or to those doing business in buildings of a special architectural design, would have been as natural and as reasonable a classification for the purpose in view, as the classification made by this act."

The facts and reasoning in this Missouri case are peculiarly applicable to the present discussion.

In *Great Atlantic & Pacific Tea Co., et al.* v. *Doughton*, 196 N. C. 145, the Court held a branch store act unconstitutional. A subsequent statute was later sustained (*Great Atlantic & Pacific Tea Co.* v. *Maxwell*, 199 N. C. 433, 155 S. E. 838) and is now on the docket of this Court.

In *Williams* v. *Standard Oil Co.*, 278 U. S. 235, this Court, per SUTHERLAND, J., stated that it was settled by recent decisions of this Court that the State could not fix prices of commodities unless the business is affected with a public interest; that nothing was gained by reiter-

ating the statement that the phrase was indefinite; it was the established test of legislative power to fix prices; and at page 240 decided that the business of dealing in gasoline, regardless of size or extent, in no essential respect differed "from a great variety of other articles commonly bought and sold by merchants and private dealers in the country" and was not "affected with a public interest."

D.

The arbitrary discriminations of the statute have no relationship to any anticipated evil.

The statute, by its definition, places in the same class every store or stores under the same ownership regardless of the commodity or merchandise dealt in, and then fixes as the basis of discrimination, solely the number of locations or separate stores within one ownership. The discrimination is, therefore, under its own definition and under the evidence, between businesses of the same character and nature and is predicated upon the incident of multiple ownership. The same store may be taxed at one rate if its owner is a one store person, but at an entirely different rate if its owner is a 20 store person. In reality, the effect upon the sales price of goods, wares or merchandise sold by chain stores, is urged by appellants as the justification for this act. It is suggested that the Legislature was empowered by these discriminatory burdens to give the owner of the unit store an advantage in his competition with the chain store. The group or quantity buying of the chain store, making possible cheaper goods to the consumer, (although under defendants' testimony a common incident to all growth and success in business) seems to be the particular element sought to be discouraged by this act (Appellants' Brief, pp. 11, 27, 51).

In *Fairmont Creamery Company* v. *Minnesota*, 274 U. S. 1, a statute of Minnesota provided that any persons in the business of buying milk for manufacture or sale, who should discriminate between localities in the state by purchasing at a higher rate in one locality than is paid by such person in another locality, after making due allowance for difference in cost of transportation, should be deemed guilty of unfair competition.

The State Court affirmed a conviction, and held that the statute was justified in preventing the destruction of competition by the purchasing methods of "centralized" creameries, saying, as quoted in this Court's opinion at page 7:

> "A centralized creamery, supplied with ample capital and facilities, has the ability and meets the temptation to destroy competition at a buying station by overbidding, absorbing the resultant losses, if any, through the profits of its general business and, when competition is ended, to buy on a non-competitive basis. If it does all this successfully, it has a monopoly, and may or may not treat producers justly."

This Court reversed, per McReynolds, J., at page 9, saying:

> "The real question comes to this—May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. *We think the inhibition of the statute has no reasonable relation to the anticipated evil*—high bidding by some with purpose to monopolize

or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse.

"In *Adams* v. *Tanner*, 244 U. S. 590, 594, this court said: 'Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.'"

In *Liggett Co.* v. *Baldridge*, 278 U. S. 105, a statute of Pennsylvania which required that no corporation should thereafter own (in excess of those owned and operated at the time of the passage of the act) any drug store unless all the members were licensed pharmacists, was held violative of the Fourteenth Amendment. The statute was a trade regulation aimed to prevent the growth of chain stores.

This Court, per SUTHERLAND, J., at page 111, said:

"The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health,

safety, morals, or some other phase of the general welfare. Here the pertinent question is: What is the effect of mere ownership of a drug store in respect of the public health?"

This Court further, at page 113, said:

"The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with *ownership*. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" (Citing cases.)

The Court, at page 113, said that the mere stock ownership of a corporation, owning a drug store, could have no real or substantial relation to public health, and that the act created an unreasonable and unnecessary restriction upon private business, saying:

"No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. *It is a matter of public notoriety that chain drug stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years.* We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. *If detriment to the public health thereby has resulted or is threatened, some evidence of it ought*

> *to be forthcoming. None has been produced, and,* so far as we are informed, either by the record or outside of it, *none exists.*"

In *Yu Cong Eng* v. *Trinidad Collector*, 271 U. S. 500, the Chinese Bookkeeping Act requiring all Chinese in the Philippine Islands to keep account books in English, Spanish, or some local dialect, was defended as a fiscal measure facilitating the collection of taxes. This Court held it invalid under the Philippine Bill of Rights that no law should "deny to any person therein the equal protection of the laws," saying, per TAFT, Ch. J., at page 528:

> "As against the Chinese merchants of the Philippines, we think the present law, which deprives them of something indispensable to the carrying on of their business, and is obviously intended chiefly to affect them as distinguished from the rest of the community, is a denial to them of the equal protection of the laws."

In *Engel* v. *O'Malley*, 219 U. S. 128, this Court, per HOLMES, J., said, at page 138:

> "It is true, no doubt, that where size is not an index to an admitted evil the law cannot discriminate between the great and small."

In the case at bar the number of stores dealing in general merchandise is not an index to any evil whatsoever. The law has discriminated solely against the number of stores under one management. This purely numerical discrimination, having no relationship to values, is, under the facts of this case, as arbitrary and unreasonable as would be a discrimination against certain letters of the alphabet. It is as though the State should attempt to tax those named Smith at a higher rate than those named Xavier, to encourage the latter.

In *Burnes Natl. Bank* v. *Duncan*, 265 U. S. 17, this Court, per HOLMES, J., at page 24 said:

> "The States cannot use their most characteristic powers to reach unconstitutional results."

In *Gulf, Colorado & Santa Fe Railway* v. *Ellis*, 165 U. S. 150, this Court in regard to arbitrary classifications prohibited by the Fourteenth Amendment, said, at page 155:

> "The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

This Court then quoted with approval from *State* v. *Loomis*, 115 Mo. 307, 314, as follows:

> "Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

And, at page 159, stated:

> "But arbitrary selection can never be justified by calling it classification."

Merchants for years have customarily conducted business through branch stores, and appellants have cited no precedent in this Court justifying what they claim was an exercise of police power in respect thereto, where a general storekeeper, resident in Indianapolis, carrying on his business "in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents" has been taxed 1,800 times as much as others carrying on the same business, of even larger size, in the same city.

POINT II.

"Store" is no unit of value nor is "number of stores under one ownership" any measure of value.

The Court below properly held that the Act as a tax statute rested on no reasonable classification having any relation to taxation and in its arbitrary discrimination against a character of store ownership violates the Fourteenth Amendment.

Appellants further attempt to sustain the act as a revenue measure (their brief, pp. 7, 29), but we do not find any suggestion that the harsh and arbitrary discrimination against a particular character of store ownership, obvious upon the face of the act, has any relationship whatsoever to the raising of revenue. No reason for the discrimination against a particular class of store ownership having any relation to taxation has ever been suggested. The discrimination is obviously without any possible relation to taxation. And appellants in their answer quite frankly attempt its justification as *in part* a tax measure intended to discourage monopoly in a particular ownership of stores generally (p. 43).

The court below has found, on the evidence, that the inequality is apparent (p. 64); that it is harsh and unreasonable (pp. 60, 61); that there is no real and substantial difference between ownership of one store and ownership of a number of stores to justify a difference of classification for the purpose of taxation; that persons owning one store handle the same goods as plaintiff and compete with him; that competition is active and aggressive; that there is no justification for placing the owners of chain stores in a different category from owners of unit stores, and that the classification, if enforced, will violate the Fourteenth Amendment (pp. 61-64).

These holdings are based upon the evidence. *There is no evidence justifying any contrary holding.* The evidence emphasizes the harsh character of the discrimination within a wide range of application, and defendants, called upon to justify such a capricious and extraordinary discrimination, have been unable to suggest any justification.

Obviously a "store" is no unit of value. It varies from bankruptcy to millions; from a peanut stand to a department store ten stories high and occupying a city block. *Nor are numbers of stores under one ownership any measure of value.* Here, also, the variation is from bankruptcy to millions through all conceivable combinations and elements. And the evidence establishes that the harshly oppressive *graduations against numbers of stores* have no relation to any tax purposes, that values have no relationship to such graduations.

In *Frost* v. *Corporation Commission*, 278 U. S. 515, this Court held violative of the Fourteenth Amendment a licensing statute of Oklahoma regulating the business of cotton ginning, which permitted an individual to engage in the business only after showing public necessity, but

allowed a corporation to engage in the same business in the same locality without such a showing. This Court, per SUTHERLAND, J., said at pages 522-3:

> "That a greater burden thereby is laid upon the latter than upon the former is clear. Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. *Arkansas Gas Co.* v. *Railroad Comm.*, 261 U. S. 379, 384, and cases cited.
>
> "The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37. This Court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. (Citing cases.) The converse, of course, is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' (Citing cases.) That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' (*Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155; *Louisville Gas Co.* v. *Coleman*, *supra*.)"

This Court further said, at page 524:

> "The differences relied upon to justify the classification are, for that purpose, without substance. * * * As a basis for the classification attempted, it lacks both relevancy and substance. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation. *Power Co.* v. *Saunders*, 274 U. S. 490, 493; *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37, 39; *Quaker City Cab Co.* v. *Penna*, 277 U. S. 389, 402."

Appellants' arguments, always advanced in such cases, that there is equality of treatment within each class, is not to the point. No statute can be sufficiently intricate to indulge in entirely individual discriminations. This Court has uniformly held that the vice of such statutes lies in defective classification.

In *Quaker City Cab Co.* v. *Penna*, 277 U. S. 389, this Court held violative of the Fourteenth Amendment an act of Pennsylvania which taxed gross receipts derived by corporations from operation of taxicabs, but did not tax like receipts of individuals or partnerships in the same kind of business. In other words, the tax was on the character of ownership, just as in the case at bar the tax is on the character of ownership. For here, there is a tax

of $3 on one store, provided the owner owns no other, but a tax of $25 on an identical store, provided it is held in an ownership which also holds other stores. In the *Quaker City Cab* case, this Court, per BUTLER, J., at page 402 said:

> "The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. *Power Co.* v. *Saunders*, 274 U. S. 490. No decision of this Court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the Fourteenth Amendment. See *The Railroad Tax Cases*, 13 Fed. 722. *County of Santa Clara* v. *Southern Pacific R. R. Co.*, 18 Fed. 385. *Northern Pacific R. Co.* v. *Walker*, 47 Fed. 681. The tax cannot be sustained."

In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, a Wisconsin tax act decreed that every transfer made within six years of death without consideration was conclusively presumed to have been made in contemplation of death. It was taxed as such. This Court held the tax act violative of the Fourteenth Amendment, and answered the contention that it might serve a useful ulterior purpose, saying at page 240:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment

and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B.' Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.

"No new doctrine was announced in *Stebbins* v. *Riley*, 268 U. S. 137, cited by defendant in error. A classification for purposes of taxation must rest on some reasonable distinction."

In *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, this Court, per McREYNOLDS, J., said, at page 210:

"In this Court the presently approved doctrine is that no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment."

And further said, at page 212:

"Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. * * * The difference between the two things" (*i. e.*, between tangibles and intangibles), "although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

In *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, a tax statute of Kentucky, as a condition to recording mortgages not maturing within five years, levied a tax of 20¢ on each

$100 of value secured, but exempted mortgages maturing within that period. This Court, at page 37, stated and cited its former decisions as holding that the rule under the Fourteenth Amendment was applicable to the exercise of all the powers of the State, "including the power of taxation," and that the power of classification under the taxing power must be reasonable and not arbitrary, and must rest upon some ground of difference having some fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced should be treated alike, and added, at pages 37-8:

> "That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155. *Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.*"

This Court added, at page 38:

> "The application of the equal protection clause does not depend upon what name is given to the tax. * * * But classification good for one purpose may be bad for another; and it does not follow that because the state may classify for the purpose of proportioning the tax, it may adopt the same classification to the end that some shall bear a burden of taxation from which others under circumstances identical in all respects save in respect of the matter of value, are entirely exempt.
>
> "Here it seems clear that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privi-

lege which, aside from the amount of the recording fee which is paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be if invoked as the sole basis for a like classification in respect of such property."

In *Southern Railway Co.* v. *Greene*, 216 U. S. 400, a tax act of Alabama was sought to be sustained as a license tax upon an additional privilege for the continued exercise of a corporate franchise. The tax was imposed upon foreign corporations but not upon domestic. This Court, per DAY, J., said at page 417:

"Arbitrary selection, it has been said, cannot be justified by calling it classification. (Citing cases.)

"It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state and other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much

> more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the state, does violence to the Federal Constitution."

In *Chalker* v. *Birmingham & N. W. Ry. Co.*, 249 U. S. 522, this Court, per McReynolds, J., at page 527 said:

> "We can find no adequate basis for taxing individuals according to the *location of their chief offices*—the classification, we think, is arbitrary and unreasonable."

In *Bethlehem Motors Co.* v. *Flynt*, 256 U. S. 421, a North Carolina statute provided that every manufacturer of automobiles engaged in selling them in the State must pay a license tax of $500, but that if the manufacturer should file a sworn statement that at least three-fourths of the entire assets of the manufacturer were invested in bonds of the State or in property within the State and reported for taxation, the license tax should be reduced to $100. This Court held that such a tax act was violative of the Fourteenth Amendment as discriminatory against foreign corporations.

In *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494, this Court held that a tax imposed upon foreign insurance companies, on the net receipts of all their business, was a denial of the equal protection of the laws, when domestic insurance companies paid no taxes on such net receipts.

The property of one person may not be burdened upon a basis so wholly different from that used for ascertaining the contribution demanded of others as to produce mani-

fest inequality. There must be some adequate reason for classification.

Kansas City So. Ry. v. *Road Imp. Dist.*, 256 U. S. 658.

In *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, this Court held that a State law which taxed all the income of local corporations derived from business done outside of the State and business done within it, while exempting entirely the income derived from outside the State by local corporations which did no local business, was arbitrary and violative of the Fourteenth Amendment, saying at page 415, per PITNEY, J.:

> "Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory."

and further, at page 416:

> "It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design."

In *City of Danville* v. *Quaker Maid, Inc.*, 211 Ky. 677, the City of Danville enacted a license and occupation tax ordinance which imposed a license tax of $12 on "regular service" grocery stores and of $40 on "self-service, cash and carry" grocery stores.

The Court held the ordinance discriminatory, at page 678 saying:

> "The only difference between the business of appellee and that of the ordinary grocery is that appellee extends credit to no one and makes no deliveries. But this difference in this detail of conducting the business affords no reasonable ground for classifying appellee on a basis for taxation purposes different from that of the ordinary grocery store."

In *People ex rel. Farrington* v. *Mensching*, 187 N. Y. 8, the Court at pages 19-20 suggested as a supposititious extreme of arbitrariness in classification a tax "on farms according to the number of fields in which they are divided" and said that such a tax "would impose a heavier burden upon one farm than upon another of the same size, situation and value." That supposititious extreme has here been exceeded. This tax, graded against the number of roofs under which a business is transacted, regardless of the nature or value of the business, is as arbitrary as would be a tax graded against the slope of such roofs.

Appellants urge as analogous herein (their brief, p. 50) the three following cases of this Court:

(a) *Metropolis Theatre* v. *Chicago*, 228 U. S. 61. The case arose on demurrer and this Court affirmed a dismissal of the complaint by the Supreme Court of Illinois. The City of Chicago had passed an ordinance which provided that "if it be intended to produce, offer or present entertainments of the first class" and the highest price of admission is $1 or more, the license fee should be $1,000, if the highest price of admission exceeded 50¢ but was less than $1, the annual license fee should be $400. The highest court of Illinois (246 Ill. 20) pointed out in its opinion that the ordinance was passed under a statute which author-

ized the city "To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure." The Supreme Court of Illinois then said:

> "Under this ordinance every person desiring to give an entertainment is left free to fix the charge of admission as he sees fit. He may thus elect into which class he desires to be placed. Presumably each person will select the class which will best promote his interests."

This Court, affirming, said at page 69:

> "In other words, there is natural relation between the price of admission and revenue, *some advantage certainly that determines the choice.* The distinction obtains in every large city of the country."

We find it difficult to see any analogy between the *Metropolis* case and the case at bar. The distinctions seem broad and plain. In the *Metropolis* case, the business was of a nature to be subject to license. In the case at bar it is not. In the *Metropolis* case there was no capital invested in the price to be charged for shows or entertainments. Any one intending to give a show could judge whether he had better charge $1 and pay a license of that class or 50¢ and pay a license of the lower class. Some advantage determined his choice. In the case at bar no such selection is open to storekeepers. Billions of dollars of investments from all over the country are committed to existing stores and when the store owner applies for his license he has no choice. It is not a question of selecting a number. It is a question of abandoning invested capital. This Court in the *Metropolis* case stated

that there was a natural relation between price of admission and revenue. Monetary units of value were involved. Whereas in the case at bar the record establishes that there is no such natural relationship between ownership in one store and ownership in multiple stores. No monetary unit or measure is involved. Plaintiff's competitors under one roof do a larger business and pay 1/1800 part of his tax. He might have 225 competitors each of which would do as large a business as he. Yet the sum total of the tax of such 225 competitors would be less than ⅛ of the tax upon him.

(b) *Quong Wing* v. *Kirkendall*, 223 U. S. 59, wherein an act of Montana imposed a license fee upon all persons engaged in the laundry business other than steam laundries, with the proviso that it should not apply to women so engaged where not more than two women were employed. This Court held that there was a distinction between a hand laundry and a steam laundry, and that the ground of distinction based on sex was not without precedent.

On the record this Court was unable to determine that the act was aimed at the Chinese, and concluded (p. 64):

> "Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. Therefore without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned the judgment must be affirmed."

(c) *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, wherein a tax on "Fisheries: Salmon canneries" was 2¢ per case and on "Fish-Oil-Works: Using herring in whole or in part in the manufacture of fish-oil: $2 per bbl."

"Fertilizer and Fish Meal Plants: Manufacturing fertilizer and Fish Meal in whole or in part from herring: $2 per ton."

The taxpayer urged upon this Court that the tax upon him was too high "as compared with taxes levied upon other lines of business." And no difficulty was found by the Court below or by this Court in recognizing differences in the different businesses taxed.

But in none of the three cases relied upon by appellants was there any classification without difference, or discrimination in the same business against character of ownership.

No precedents of this Court have been referred to by appellants wherein State legislation of the type or character of the enactment at bar has been sustained.

POINT III.

The court below properly held that the Act deprives appellee of rights guaranteed him under the Constitution of the State of Indiana.

The Act decrees, in Section 1 thereof, that after the 1st of July, 1929, it shall be *unlawful* to conduct any store in Indiana without having obtained a license. The statute is penal. The offender, by Section 9, is made guilty of a misdemeanor and subject to daily fine and penalty.

Under the Indiana decisions the Legislature has no authority to pass such a sweeping act where no exercise of the police power is involved. This is true although the General Assembly has full authority to levy occupational taxes for the purpose of raising revenue. (*Shuman* v. *City of Fort Wayne*, 127 Ind. 109).

In that case the Court stated that all licenses are in their nature restrictive and that the power to license depends upon the concurrent power to prohibit. In the course of its opinion the Supreme Court at page 115 said:

> "The power to license depends upon the concurrent power to prohibit. The business or occupation is declared unlawful, except upon compliance with certain conditions. A license, then 'is a privilege granted to carry on some occupation or exercise some right which could not be legally exercised without the grant of such license. The pursuit of the prohibited occupation becomes a franchise in the power of the municipality to grant, and the license fee is the price exacted for the right to exercise the franchise.' Horr and Bemis Mun. Police Ordinances, section 257; *Chilvers* v. *People*, 17 Mich. 42."

We submit that a license may not be required as a condition precedent where the business is wholly lawful, especially where, as here, the Legislature does not use the license merely as a tax receipt or a method of collecting the revenue, but in fact outlaws the business unless a license be obtained.

Under the Indiana decisions, if a store operator should fail to obtain a license, his contracts are rendered void and unenforceable.

In the case of *Bright National Bank* v. *Hartman*, 61 Ind. App. page 440, at page 447, the Court said:

> "It is the law of Indiana that where a statute forbids the carrying on of any business without first procuring a license, paying a tax, inspection, registration, complying with prescribed tests, or the like, contracts relating thereto made by persons in carrying on such business are void, though the statute contains no express provision to that effect."

The net result is that a lawful business is outlawed as an incident to raising revenue and not because of any power on the part of the state authorities to regulate it or make rules for the manner in which it should be conducted.

This Act renders unlawful the business of merchandising. It leaves all other lawful business occupations in a wholly different situation. It grants to other classes of citizens, relatively, privileges and immunities which are not on equal terms held out to the operators of stores.

Section 23 of Article 1 of the Indiana Constitution provides:

> "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The appellants urge that the act in question was passed to encourage one person in competition with another. For $3 the unit store owner secures the privilege of having his competitor burdened with a tax of $5,443. Equality has been destroyed. Such a tax constitutes a special privilege in the nature of a monopoly. "It begins in a pretense for the public good and ends in crippling the general industry."

Cooley, Law of Taxation, 2nd Ed., p. 235.

In *Powell* v. *Pennsylvania*, 127 U. S. 678, this Court at page 684 said:

> "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an es-

sential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The Court assents to this general proposition as embodying a sound principle of constitutional law."

In the case at bar the Court below at page 58 said:

"The framers of the Constitution of the State of Indiana obviously had in mind the fair and equal treatment of all the citizens of such State with respect to the assessment and collection of taxes. The provisions contained in such Constitution and Bill of Rights would so indicate."

POINT IV.

That ownership in chain stores threatens no detriment to the public has herein a factual basis of record. The decision below should be affirmed.

This Court has taken judicial notice of the fact that chain stores in great numbers are to be found throughout the United States; that they have been in operation for many years; this Court has determined that no detriment to the public in the absence of evidence will be presumed to have resulted or to be threatened from the character of their ownership; to be persuaded to the contrary this Court has stated that some evidence should be forthcoming (*Liggett Co.* v. *Baldridge, supra*).

The unanimous decision of the statutory three judge court has the factual basis of evidence adduced by both sides. No evidence of detriment to the public has been forthcoming. Affirmative evidence disproves any detriment. Testimony of appellants' witnesses precludes its existence and the answer of appellants admits that the

Act has "no immediate relation to public health, public morals or public safety."

Thus, although general storekeeping is not a business so far affected with a public use as to become subject to state regulation of this character, and the decision below would well be justified by the text of the Act itself and the obvious lack of relationship of provisions to purpose, nevertheless, there is, in addition, factual foundation of record.

O'Gorman & Young v. *Hartford Fire Ins., Co.*,
U. S. decided 5 January, 1931
(Adv. Sheet No. 5, p. 162).

No error has been suggested in the manner in which the three judge court arrived at its conclusions. After the adequate hearing and full determination intended by Section 266 have been had (*Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10), it should take a very clear case upon the record to justify this Court in now setting aside such conclusions on questions of fact (*Chicago G. & W. Ry.* v. *Kendall*, 266 U. S. 94, 100).

The decree appealed from should be affirmed.

Respectfully submitted,

SAMUEL ASHBY,
CLARK MCKERCHER,
WILLIAM H. THOMPSON,
HENRY H. HORNBROOK,
MARTIN A. SCHENCK,
Solicitors for Appellee.

APPENDIX.

ACT OF INDIANA GENERAL ASSEMBLY.
APPROVED MARCH 16, 1929.

(Acts 1929, Chapter 207, page 693.)

An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state board of tax commissioners in connection therewith, and prescribing penalties for the violation thereof.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That from and after the first day of July, 1929, it shall be unlawful for any person, firm, corporation, association or co-partnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained a license so to do from the state board of tax commissioners, as hereinafter provided.

Sec. 2. Any person, firm, corporation, association or co-partnership desiring to operate, maintain, open or establish a store in this state shall apply to the state board of tax commissioners for a license so to do. The application for a license shall be made on a form which shall be prescribed and furnished by the state board of tax commissioners, and shall set forth the name of the owner, manager, trustee, lessee, receiver or other person desiring such license; the name of such store; the location, in-

cluding the street number, of such store; and such other facts as the state board of tax commissioners may require. If the applicant desires to operate, maintain, open or establish more than one such store, he shall make a separate application for a license to operate, maintain, open or establish each such store, but the respective stores for which the applicant desires to secure licenses may all be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this act.

Sec. 3. As soon as practicable after the receipt of any such application, the state board of tax commissioners shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If, upon examination, the state board of tax commissioners shall find that any such application is not in proper form and does not contain the necessary and requisite information, it shall return such application for correction. If an application is found to be satisfactory, and if the filing and license fees, as herein prescribed, shall have been paid, the state board of tax commissioners shall issue to the applicant a license for each store for which an application for a license shall have been made. Each licensee shall display the license so issued in a conspicuous place in the store for which such license is issued.

Sec. 4. All licenses shall be so issued as to expire on the thirty-first day of December of each calendar year. On or before the first day of January of each year, every person, firm, corporation, association, or co-partnership having a license, shall apply to the state board of tax commissioners for a renewal license for the calendar year next ensuing. All applications for renewal licenses shall

be made on forms which shall be prescribed and furnished by the state board of tax commissioners. No license shall lapse prior to the thirty-first day of January of the year next following the year for which such license was issued, and if, by such thirty-first day of January, an application for a renewal license has not been made, the state board of tax commissioners shall notify such delinquent license-holder thereof, by registered mail, and if application is not made for and a renewal license issued on or before the last day of February, next ensuing, the former license shall lapse and become null and void. Each such application for a renewal license shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this act.

Sec. 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fees prescribed in sections 2 and 4 of this act.

The license fees herein prescribed shall be as follows:

1. Upon one store, the annual license fee shall be three dollars for each such store;

2. Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

3. Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

4. Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

5. Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store.

Sec. 6. Each and every license issued prior to the first day of July of any year shall be charged for at the full rate, and each and every license issued on or after the first day of July of any year shall be charged for at one half of the full rate, as prescribed in section 5 of this act.

Sec. 7. The provisions of this act shall be construed to apply to every person, firm, corporation, co-partnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Sec. 8. The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale.

Sec. 9. Any person, firm, corporation, co-partnership or association who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each and every day that such violation shall continue shall constitute a separate rate and distinct offense.

Sec. 10. Any and all expenses incurred by the state board of tax commissioners in the administration of this act shall be paid out of the funds accruing from the fees imposed by and collected under the provisions of this act. All money collected under the provisions of this act less the expenses incurred in the administration of this act, shall be paid into the state treasury, monthly, by the state board of tax commissioners, and shall be added to and shall constitute a part of the general fund. Of the funds which shall accrue to the general fund during the fiscal year ending September 30, 1929, under the provisions of this act, the sum of two hundred and fifty thousand dollars shall be transferred to the school relief fund by the auditor of state; and of the funds which accrue to the general fund under the provisions of this act during the fiscal year ending September 30, 1930, the sum of five hundred and fifty thousand dollars, and during the fiscal year ending September 30, 1931, the sum of five hundred thousand dollars, and during each fiscal year thereafter the sum of three hundred thousand dollars shall be transferred to the school relief fund by the auditor of state. The transfer of such amount from the general fund to the school relief fund shall be made on the first day of January, 1930, and on the first day of January of each year thereafter, and no part of the money so transferred shall revert to the general fund at any time. The money so transferred shall be distributed in the same manner as the school relief fund is distributed, as provided by law, except that if any portion of such fund so transferred during any fiscal year is not needed in the regular school relief fund distribution, such excess may be used to apply on deficits existing from preceding years. The term "school relief fund" as used in this section shall be construed to mean that portion of the common school fund

set apart by section 3, chapter 201, of the Acts of the general assembly of 1921 and which is therein designated as a "relief fund."

Sec. 11. The state board of tax commissioners is hereby authorized to employ such clerical assistants as may be necessary to carry out and administer the provisions of this act, and to prepare and print such blanks, forms, reports, receipts and any and all other things which may be necessary to provide for the administration of this act, and to pay any and all such expenses so incurred out of the fund collected under the provisions of this act. The sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the general fund of the state treasury not otherwise appropriated, to be available upon the taking effect of this section, and to be used by the state board of tax commissioners in defraying any expenses which may be incurred in the administration and in preparing to administer this act before sufficient funds shall have been collected from license fees, as hereinbefore provided. As soon as a sufficient amount of license fees shall have been collected under the provisions of this act, the two thousand dollars hereby appropriated, or so much thereof as shall have been used, shall be returned to the general fund. Whereas an emergency exists for the immediate taking effect of this section, the same shall be in full force and effect from and after its passage.

Sec. 12. If any section, provision or clause of this act should be declared invalid, such invalidity shall not be construed to effect the portions of the act not so held invalid.

Sec. 13. This act, except section 11, shall be in effect from and after the first day of July, 1929.

ARTICLE 1, SECTION 23, INDIANA CONSTITUTION

The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

ARTICLE 10, SECTION 1, INDIANA CONSTITUTION

The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be especially exempted by law.

SUPREME COURT OF THE UNITED STATES.

No. 183.—October Term, 1930.

State Board of Tax Commissioners of the State of Indiana, *vs.* Lafayette A. Jackson.	Appeal from the United States District Court for the Southern District of Indiana.

[May 18, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from the decree[1] of a specially constituted District Court[2] perpetually enjoining the appellants from enforcing against the appellee the provisions of Act No. 207 of 1929 of the General Assembly of the State of Indiana. The appellee, by bill filed on behalf of himself and all others similarly situated, charged that the statute violates the Fourteenth Amendment of the Federal Constitution and two sections of the constitution of Indiana. It averred, and the answer admitted, that, unless enjoined, appellants would institute prosecutions against appellee under certain sections of the act. After hearing, the District Court entered a perpetual injunction, holding the law offensive to the federal and to the state constitution.

The statute provides that it shall be unlawful for any person, firm, association or corporation, foreign or domestic, to establish or operate any store[3] within the State without first obtaining from the appellants a license, which must be renewed annually. It makes the operation of a store without a license a misdemeanor

[1] 38 F. (2d) 652.

[2] Pursuant to U. S. C., Tit. 28, § 380.

[3] Section 8 defines a store as follows:

The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares, or merchandise of any kind, are sold, either at retail or wholesale.

punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars for each day it is so operated.

Section 5 of the act provides:

Every person, firm, corporation, association or copartnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in sections 2 and 4 of this act.

The license fees herein prescribed shall be as follows:

(1) Upon one store, the annual license fee shall be three dollars for each such store;

(2) Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

(3) Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

(4) Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

(5) Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store.

It is this section which appellee asserts renders the act unconstitutional as applied to him.

The bill of complaint alleges and it is admitted that the appellee is engaged in the business of selling groceries, fresh vegetables and meats at wholesale and retail in Indianapolis, and has been so engaged for more than ten years, has captial invested in his business, in excess of $200,000, and annual sales of over $1,000,000. He operates two hundred and twenty-five stores in the said city, and more than five hundred persons, firms, associations and corporations, foreign and domestic, are engaged in the operation of two or more stores in the State.

The bill charges that the graduation of the tax per store according to the number of stores under a single ownership and management is based on no real difference between a store part of such a group and one individually and separately owned and operated, or between the business transacted in them; that the number of stores

conducted by one owner bears no relation to the public health, welfare, or safety, none to the size of the enterprise as a whole, to its capital, its earnings or its value; that the classification made by the statute is without basis in fact, is unreasonable and arbitrary, and results in depriving him of his property without due process, and denying him the equal protection of the laws.

In the court below appellants defended on the grounds that the statute was an exercise of the police power and was also a revenue measure which levied an ordinary occupation tax. They offered no evidence to sustain the first ground mentioned, and do not press it here. They now stand only upon the power of the legislature in prescribing an occupation tax, to classify businesses, so long as its action is not unreasonable and arbitrary. They say that the act fulfills the constitutional requirement that, in so classifying, the law-making body shall apply the same means and methods to all persons of the same class, so that the law will operate equally and uniformly, and all similarly circumstanced will be treated alike. The District Court held that the statute failed to conform to this standard.

The act adopts a different measure of taxation for stores known as chain stores, from that applied to those owned and operated as individual units. Evidence was offered by the appellee intended to demonstrate that there are no substantial or significant differences between the business and operation of the two kinds of stores, such as would justify the classification, and by the appellants to prove the existence of such differences.

The District Court failed to make findings of fact and law as now required by Equity Rule 70½, but contented itself with a partial summary of the facts and certain general conclusions of law. Had the rule been in force at the time of the trial, we should feel constrained to remand the case with directions to make such findings. We shall, in the circumstances, summarize the proofs.

In addition to the facts averred in the bill, above set forth, the appellee offered uncontradicted evidence on the following points. Of the retail stores of the country approximately sixty-three per cent. are independent or community stores, sixteen per cent. are department stores, twelve per cent. are chain stores, and four per cent. are mail-order houses. Several department stores in Indianapolis doing a much larger business than the appellee pay a tax of only $3 as contrasted with his tax of $5443, although

their business is highly competitive with that of chain stores. Persons owning a greater number of stores, and with more money invested, in a business similar to that of appellee, but having only one store in Indiana, pay $3 because they have but one store in the State. Large numbers of stores independently owned and controlled are members of associations or "voluntary chains" under which cooperative buying is conducted for the group, but each of them is required to pay a license fee of only $3. The mere addition of a new unit or store to an existing chain of stores does not increase the sales more than arithmetically. The additional unit has its own expenses, and the volume of sales of the former stores in the chain, to which it constitutes an addition, is not increased by adding it.

The appellants produced evidence to prove that there are many points of difference between chain stores and independently owned units. These consist in quantity buying, which involves the application of the mass process to distribution, comparable to the mass method used in production; buying for cash and obtaining the advantage of a cash discount; skill in buying, so as not to overbuy, and at the same time keep the stores stocked with products suitable in size, style and quality for the neighborhood customers who patronize them; warehousing of goods and distributing from a single warehouse to numerous stores; abundant supply of capital, whereby advantage may be taken of opportunities for establishment of new units; a pricing and sales policy different from that of the individual store, involving slightly lower prices; a greater turn-over, and constant analysis of the turn-over to ascertain relative profits on varying items; unified, and therefore cheaper and better advertising for the entire chain in a given locality; standard forms of display for the promotion of sales; superior management and method; concentration of management in the special lines of goods handled by the chain; special accounting methods; standardization of store management, sales policies and goods sold.

The appellants' evidence indicated that all of these advantages are interrelated and interdependent in the chain store business. The witnesses conceded that some of them may be found in large independent grocery or drug stores or the like, but they did not, as appellee claims, state that all of them combined, exist therein, as in chain stores.

The record shows that the chain store has many features and advantages which definitely distinguish it from the individual store dealing in the same commodities. With respect to associations of individual stores for purposes of cooperative buying, exchange of ideas as to advertising, sales methods, etc., it need only be remarked that these are voluntary groups, and that series of independent units cannot, in the nature of things, be as efficiently and successfully integrated as a chain under a single ownership and management.

But the appellee in proof and argument drew a comparison between the chain store and the department store which he insists exhibits the classification of the statute as illusory and arbitrary. He proved that there are two department stores in Indianapolis, each doing a business in excess of $8,000,000 a year, one having 124 and the other 86 separate departments, and that under the law each pays a tax of only $3. He uses these facts to give point to his assertion that a store is not a unit of value. This argument ignores the fact that in determining how it shall classify occupations for taxation, the legislature is not confined merely to the value of the business taxed, but may have regard to other elements.

While it is true that large department stores reap many of the advantages and employ many of the methods of a chain store group, such as large capital, buying in quantity, and the ability to command the highest type of management, it is, nevertheless, evident that whereas a department store spreads its efforts over a number of different sorts of shops under one roof, the chain store owner concentrates its energy upon the conduct of but one kind of stores located in many neighborhoods. Obviously greater specialization in management and methods is possible in the latter type of enterprise than in the former, whose management, however capable, must after all consist of many separate types each devoted to a single store similar to an independent retail store. The mass buying done by a chain store owner for a number of units selling the same goods, is not comparable to the individuated purchasing of a department store for its grocery, its shoe, its drug, and each of its other departments. It is not to be expected that the management problems of stores, essentially separate and differing entirely in the character of their business, under the aegis of a single department store, will be the same as those involved in the intensive selling of a chain store owner operating an equal number of units all devoted to a single line of business.

Notwithstanding the differences disclosed between chain and other stores, the court below found that "all persons engaged in the operation of one or more stores . . . belong to the same class, for occupational tax purposes, as plaintiff, and should pay the same license fee, regardless of the number of stores owned and operated by them," and that any other classification is arbitrary and unconstitutional. It is this holding which the appellants challenge.

The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. *Bell's Gap R. R.* v. *Pennsylvania,* 134 U. S. 232; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain it. *Rast* v. *Van Deman,* 240 U. S. 342; *Quong Wing* v. *Kirkendall,* 223 U. S. 59. As was said in *Brown-Forman Co.* v. *Kentucky, supra,* at p. 573:

"A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear.

In *American Sugar Refining Co.* v. *Louisiana, supra,* a license tax imposed upon persons and corporations carrying on the business of refining sugar and molasses, which excepted planters and farmers grinding and refining their own sugar and molasses, was held not to work an unconstitutional discrimination.

In *Cargill* v. *Minnesota,* 180 U. S. 452, a state statute requiring the proprietors of warehouses situated on the right of way of a railroad to secure a license from a state commission, and containing no such requirement with respect to warehouses not so situated but doing exactly the same business, was held valid.

In *Armour Packing Co.* v. *Lacy,* 200 U. S. 226, a North Carolina statute imposed an occupation tax upon every meat packing house doing business in that state. The Armour Company, which was taxed under this statute, had its packing house at Kansas City and shipped its packed products to various depots in the state, where they were sold and delivered in competition with wholesalers and commission merchants who were not required to pay the tax. The statute was sustained.

In *Quong Wing* v. *Kirkendall, supra,* a statute of Montana imposing a license fee on hand laundries was held not to constitute a denial of the equal protection of the laws because it did not apply to steam laundries, and because it exempted from its operation laundries not employing more than two women.

In *Bradley* v. *Richmond,* 227 U. S. 477, an ordinance imposed a tax on the conduct of various businesses and gave a power of classification to a committee of the council. That committee classified private bankers, placing a tax of one amount on certain of them and of a different amount on others. It appeared that the business of those in the one class was that of lending money at high rates upon salaries and household furniture, while that done by the other class was that of lending money upon commercial securities. The classification was held not to offend the constitutional provision for equal protection of the laws.

In *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, an ordinance classified theatres for license fees based on and graded according to the admission charged. It was shown that some of the theatres charging a higher admission had less revenue than those charging a smaller price, and therefore paying lower license fees. This Court held the classification valid.

In *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304, there was drawn in question a statute of Alabama which provided that every person, firm or corporation selling or delivering sewing machines in person or through agents should pay a tax of $50 annually for each county in which they might sell or deliver said articles; and for each wagon and team used in delivering or displaying the same an additional sum in each county of $25 annually. It exempted merchants selling sewing machines at their regularly established places of business. The Singer Company, a foreign corporation, was engaged in many counties in the State in selling and renting sewing machines, in part from regularly established places of business and in part by means of wagons going from place to place in counties where its stores were located. It attacked the statute on the ground that it involved an arbitrary discrimination between merchants selling at their stores and merchants selling by means of wagons. It was shown that the merchants who sold at their stores usually delivered the articles sold by wagon. This Court sustained the tax, saying with respect to the two kinds of business:

"But there is an evident difference, in the mode of doing business, between the local tradesman and the itinerant dealer, and we are unable to say that the distinction made between them for purposes of taxation is arbitrarily made. In such matters the States necessarily enjoy a wide range of discretion, and it would require a clear case to justify the courts in striking down a law that is uniformly applicable to all persons pursuing a given occupation, on the ground that persons engaged in other occupations more or less like it ought to be similarly taxed."

In *Rast* v. *Van Deman, supra*, a statute placing taxes additional to the usual occupations taxes on persons who offered, with merchandise bargained or sold in the course of trade, coupons, profit-sharing certificates, or the like, was attacked as being arbitrary and unreasonable, in that the only difference between the other merchants and those who used trading stamps was a difference in the method of advertising. This Court said, however:

"The difference between a business where coupons are used, even regarding their use as a means of advertising, and a business where they are not used, is pronounced. Complainants are at pains to display it. The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, . . ."

In *Armour & Co.* v. *Virginia*, 246 U. S. 1, the statute under attack laid a tax on merchants doing business in the State based on the amount of their purchases during the license period, including as purchases all goods and merchandise manufactured by the licensee and sold or offered for sale in the State. It excluded from its operation domestic manufacturers, taxed on capital, who offered for sale at the place of manufacture goods and merchandise manufactured by them. It applied alike to citizens and residents of Virginia and non-citizens and non-residents who manufactured in Virginia. The state supreme court held that it applied to Armour & Co., who manufactured part of their products without the State and sold them within it. This Court said:

"In the first place, we are of opinion that the distinction upon which the classification in the statute rests between a manufacturer selling goods by him made at their place of manufacture and one engaged as a merchant in whole or in part in selling goods of his manufacture at a place of business other than where they were made is so obvious as to require nothing but a mere statement of the two classes. All question concerning the equal protection clause of the Fourteenth Amendment may therefore be put out of view."

In view of the numerous distinctions above pointed out between the business of a chain store and other types of store, we cannot pronounce the classification made by the statute to be arbitrary and unreasonable. That there are differences and advantages in favor of the chain store is shown by the number of such chains established and by their astonishing growth. More and more persons, like the appellee, have found advantages in this method of merchandising and have therefore adopted it. What was said in *Metropolis Theatre Co.* v. *Chicago, supra,* is quite applicable here:

". . . The distinction obtains in every large city of the country. The reason for it must therefore be substantial, and if it be so universal in the practice of the business it would seem not unreasonable if it be adopted as the basis of governmental action."

The court below fell into the error of assuming that the distinction between the appellee's business and that of the other sorts of stores mentioned was solely one of ownership. It disregarded the differences shown by the record. They consist not merely in

ownership, but in organization, management, and type of business transacted. The statute treats upon a similar basis all owners of chain stores similarly situated. In the light of what we have said this is all that the Constitution requires. *Clark* v. *Titusville*, 184 U. S. 329; *Magoun* v. *Illinois Tr. & Savings Bank*, 170 U. S. 283.

Article 1, § 23 of the constitution of Indiana[4] which the court below held the statute violates, seems to us not to set any different standard than does the Fourteenth Amendment. No decision of the Indiana courts is cited in support of the court's conclusion, and those referred to by appellants demonstrate that the section permits classification for purposes of taxation and that the same principles are applicable as under the Fourteenth Amendment. *Kersey* v. *Terre Haute*, 161 Ind. 471; *Gafill* v. *Bracken*, 195 Ind. 551. Article 10, § 1,[5] is declared by the Supreme Court of the State to be applicable only to the assessment made under a general levy, and not to occupation or license taxes. *Thomasson* v. *State*, 15 Ind. 449; *Bright* v. *McCullough*, 27 Ind. 223; *Gafill* v. *Bracken*, *supra*. We cannot, therefore, hold the statute repugnant to the clauses of the state constitution on which the appellee relies.

The judgment of the District Court must be reversed and the cause remanded with instructions to dismiss the bill.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[4] "The General Assembly shall not grant to any citizen or class of citizens privileges and immunities which upon the same terms shall not equally belong to all citizens."

[5] "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes as may be especially exempted by law."

SUPREME COURT OF THE UNITED STATES.

No. 183.—October Term, 1930.

State Board of Tax Commissioners of the State of Indiana, James Showalter, Pliny H. Wolfard, etc., et al., Appellants,
vs.
Lafayette A. Jackson.

Appeal from the District Court of the United States for the Southern District of Indiana.

[May 18, 1931.]

Mr. Justice Sutherland, dissenting.

By the statute here under review, the operation of any "store" within the state without a license is made unlawful. The license fees to be paid are graduated according to the number of "stores" to be operated "under the same general management, supervision or ownership". Upon one store, the annual license fee is $3; upon two or more up to five, $10 for each additional store; in excess of five but not exceeding ten, $15 for each additional store; in excess of ten but not exceeding twenty, $20 for each additional store; and in excess of twenty, $25 for each additional store.

Upon the face of the statute the sole differentiation on which the graduated and rapidly mounting license fees depend consists in the number of stores operated. But the tax is imposed in respect of a single "store", without regard to kind, value, size, amount invested, amount or character of business done, income derived, or other distinguishing feature. The number of stores is a collateral circumstance used only to determine the amount of the license fee to be exacted in respect of each of them. A retailer pays the same as a wholesaler; the owner of a small corner grocery, operated by him alone, the same as the owner of a large department store employing hundreds of clerks. To determine that a tax of $25, instead of $3, $10, $15, or $20, shall be imposed in respect of any store, it is necessary only to have an affirmative answer to the inquiry—Is this store operated by a person who already owns or operates twenty or more stores? These facts are of controlling importance because they give rise to the point upon which the question of constitutionality depends.

It is settled that the power of the state to classify for purposes of taxation is of wide range and flexibility; but that, while the difference upon which the classification is based need not be great, mere difference is not enough. Classification, to be legitimate, must rest upon some ground of difference having a reasonable and just relation to the object of the legislation. All persons similarly circumstanced must be treated alike. *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37, and cases cited. These principles, repeatedly stated by this court, are fundamental; and it reasonably cannot be doubted that their application to the present act, unless saved by certain extrinsic circumstances to be considered later, necessarily condemns it as unconstitutional. I am unable to find in any of these circumstances, or in all of them together, justification for a classification which results in distributing the burden of taxation with such evident inequality.

The purpose of the act is to raise revenue, and upon that theory the decision of this Court is based. The contention that the act constitutes an exercise of the police power finds no support in the record and was but faintly urged at the bar. Whether the classification could be justified if the statute were other than a revenue measure, is a question, therefore, with which we are not now concerned. The pertinent and only question is whether between a store constituting one of a series under unified management, supervision or ownership, and a store under single and distinct management, supervision or ownership, there are such differences as to justify putting them in separate categories with the object of imposing, for the sole purpose of revenue, a larger tax in respect of one than in respect of the other. If the differences bear no just and reasonable relation to that object, the classification cannot be sustained, although the same differences might bear such a relation to some other and different object.

In the State of Indiana there are approximately 44,000 retail stores engaged in the same general lines of business, only eight per cent. of which are so-called "chain stores." Among them are single stores each of greater value than all the stores of appellee combined, and each doing a business in excess of all that done by appellee. For example, there are two large department stores in the City of Indianapolis each doing a business of more than $8,000,000 per annum, one operating 124 separate departments and the other, 86 separate departments, but each pays a license fee under the

statute of only $3 per annum; while appellee, owning 225 separate stores and doing a total business of approximately $1,000,000 per annum, pays license fees of $5,443 per annum—eighteen hundred times as much! Each of several owners of a large number of stores, (145 in one instance) who happens to have only one store in Indiana, pays a license fee of $3, contrasted with the payment of $25 for each store over twenty owned by appellee. Appellee, upon 205 of his stores, pays the aggregate sum of $5,125; while the proprietors of 205 stores, held and operated separately, pay in the aggregate only $615, although they or some of them may be of equal or greater value, equally well or better located, doing as much or more business, and producing as much or more income. The evidence further shows that a "cooperative volunteer chain" consisting of several hundred stores in Indiana, paying an annual license fee of only $3 each, operates under an association called the Independent Grocers' Alliance. The association carries on cooperative buying and advertising for the benefit of the members of the group; and it seems clear that as to most, if not all, of the advantages said to be enjoyed by the chain stores the volunteer cooperative group occupies a position of equality.

These are obvious and flagrant discriminations which put upon the act the clear stamp of unconstitutionality, unless the differences relied upon are germane to, and reasonably sufficient in substance to sustain, the proposed imposition of license fees of such unequal amounts upon different persons following identical occupations.

What, then, are the differences, or so called advantages, relied upon to justify the classification? They were, in their strongest aspect, stated by an expert witness called by the appellants in support of the act, as follows: The ability of the chain stores to make large quantity purchases; to pay cash and thus obtain the advantage of discounts; skill in buying so as to avoid either overstocking or understocking; warehousing in, and distribution from, a single warehouse for numerous stores; large capital with the advantages flowing therefrom; certain pricing and sales policies resulting in slightly lower prices on the part of the chain stores as compared with single stores; more rapid turn-over of goods; cheaper and better advertising; superior management; standardization in the matter of display; standardization of store management; and similar elements thought to have a beneficial effect upon the disposition of goods.

But the effect of this enumeration of supposed advantages is completely swept away by the testimony of the same witness on cross-examination, which stands upon the record without dispute, that they are not confined to the chain stores, but are enjoyed as well by such of the favored taxpayers as are engaged in large business, whether in a single establishment or in many establishments.

"Every advantage that I have spoken of as relating to the chain group is that which inheres, primarily, in volume and management without respect to whether it is involved in a chain group or in a single store. Good management makes for volume and volume makes for the possibility of making or acquiring more capital, and more capital makes for the possibility of employing the highest grade of experts, so that there is constant intercommunication or revolving. I would find the same advantage adhering in a large department store over a small one. Every quality that I have enumerated as going to the manner of organization relates itself, primarily, to there being a sufficient capital structure and volume of business to permit it to be carried on and I would add management in that it is an essential part of it.

. . . . . .

"Q. So that it does not relate itself to the form of organization—whether they are administering fifty or a hundred stores, or administering one store?

"A. No, no.

. . . . . .

"Q. The fact that it is administering multiplely owned stores has nothing to do with it, but it is the fact that it is administering a large business that develops the situation that you have referred to?

"A. That is true. But I might add that the management of a large number of stores may contribute to the more rapid increases in the size.

"Q. Just as the manager of a large unit store, with many departments, may develop the ability to strengthen and enlarge those departments?

"A. Yes.

"Q. And the problem would be identical, wouldn't it in the case of Macy or Gimbel—or, taking it locally, in connection with Ayres, or Block?

"A. Yes, I would say the problem would be the same. There is no difference in the functions that are performed here—the function of retailing."

It thus appears that the advantages attributed to the chain store lie not in the fact that it is one of a *number* of stores under the same management, supervision or ownership, but in the fact

that it is one of the parts of a *large business.* In other words, the advantages relied upon arise from the aggregate size of the entire business, and not from the number of parts into which it is divided. For the want of a valid ground upon which to stand, therefore, the classification should fall, because it is made to depend not upon size or value or character, amount of capital invested or income received, but upon the mere circumstance—wholly irrelevant so far as any of the advantages claimed are concerned—that the business of one is carried on under many roofs, and that of the other under one only. Reduced to this single detail of difference, what fairly conceivable reason is there in the policies or objects of *taxation* which gives countenance to the requirement that the former shall make an annual contribution to the revenues of the state eighteen hundred times as much as the latter? A classification comparable in principle would be to make the amount of an income tax depend upon the number of sources from which the income is derived, without regard to the character of the sources or the amount of the income itself.

Since the supposed differences thus are reduced to the one of number only, and, since that turns out to be irrelevant and wholly without substance, it follows that the act is a "clear and hostile discrimination" against a selected body of taxpayers, *Bell's Gap R'd Co.* v. *Pennsylvania,* 134 U. S. 232, 237—a mere subterfuge by which the members of one group of taxpayers are unequally burdened for the benefit of the members of other groups similarly circumstanced. All of which is to say that the legislature has misapplied its power to classify with the result of reaching an end forbidden by the Fourteenth Amendment.

To this situation the language of Mr. Justice Field in *County of Santa Clara* v. *Southern Pac. R. Co.,* 18 Fed. 385, 399, seems peculiarly applicable.

"Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The

amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to this end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions; than any other cause in the world."

It seems plain enough that we have in the present case "a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result."

In *Quaker City Cab Co.* v. *Penna.*, 277 U. S. 389, this court held invalid a Pennsylvania statute which imposed a tax upon the gross receipts of a corporation engaged in the general taxicab business, but not upon like receipts of individuals and partnerships engaged in the same business. The differences relied upon as justifying the tax are fairly comparable with those relied upon in the present case. It was said that there were advantages peculiar to the corporate organization not enjoyed by individuals or partnerships, such as those pointed out in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 162: "The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships."

These advantages, although brought sharply to the attention of the court, were not considered as constituting differences having a reasonable relation to the object of the taxing act, and the tax was held unconstitutional as denying to the corporation the equal protection of the laws. It is hard to see how that conclusion can be reconciled, in principle, with the present decision. See also *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415; *Bethlehem Motors Co.* v. *Flynt*, 256 U. S. 421; *Kans. City So. Ry.* v. *Road Imp. Dist. No. 6*, 256 U. S. 658; *Air-Way Corp.* v. *Day*, 266 U. S. 71, 83, 85; *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37. A long list of illustrative cases which tend to support the view that the act in question is violative of the equal protection clause of the Fourteenth Amendment readily could be added; but nothing would be gained by doing so.

A large number of decisions are cited in support of the act. They, as well as those cited above, demonstrate the impossibility of stating precisely or categorically the distinction between such statutes as fall within, and such as fall without, the ban of the Constitution. The decisions have depended not only upon the varying facts which constituted the background for the particular legislation under consideration, but also, to some extent, upon the point of view of the courts or judges who have been called upon to deal with the question. Some of the cases press to the limit fixed by the constitution; and that fact, while affording no ground for objection to the cases themselves, admonishes us to use caution in applying them to other sets of substantially dissimilar circumstances, lest, by doing so, we pass into the forbidden territory which lies wholly beyond the verge. I am unable to discover in any of the prior decisions of this court, including those cited, anything, which in the light of the facts and circumstances herein set forth, lends support to the claim of validity for the classification here under consideration. To attempt an extended review of the cases thought to do so is not necessary. It will be enough to refer to those which seem to be regarded as most strongly in point.

American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89, involved the validity of a license tax upon those carrying on the business of refining sugar and molasses, but exempted planters and farmers grinding and refining their own sugar and molasses. The classification was upheld upon the ground that the steps taken by planters and farmers to perfect their product for the market were an incident to the original growth of the cane; and that this distinction saved the classification from being purely arbitrary, oppressive or capricious. It was, as this court pointed out in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 561, a tax upon the *business* of refining sugar and molasses, exempting therefrom those who refined only their own sugar and molasses.

In *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, the statute required that the owner of an elevator or warehouse situated on the right of way of a railroad, etc., should procure a license therefor at a nominal fee. The act was assailed because it did not apply to elevators and warehouses not so situated. The court sustained the classification because the railroad was a public highway, the use of which could be so regulated as to promote the ends for which the corporation was created and thus subserve the interests of the gen-

eral public. Moreover, it was neither alleged nor proved in that case that there were in the state any elevators or warehouses not situated upon a railroad right of way.

In *Quong Wing* v. *Kirkendall*, 223 U. S. 59, the statute involved imposed a license fee on hand laundries, but not upon steam laundries, and exempted from its operation laundries not employing more than two women. The classification was sustained, principally upon the authority of the two cases referred to immediately above.

In *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, a classification of theatres for license fees graded according to the prices of admission was held not to be arbitrary or unreasonable, because, although there might be exceptional cases, there was a natural relation between the price of admission and revenue.

While opinions might differ in respect of the wisdom or fairness of some of the statutes involved, as, for example, the laundry tax statute which taxed the small hand laundry and exempted the large steam laundry, the differences were germane to the object and sufficiently substantial to save the classification in each case from being condemned as purely arbitrary or capricious.

It may be that here the maximum tax of $25 for each store, while relatively high, is not, if considered by itself, excessive; but to sustain it will open the door of opportunity to the state to increase the amount to an oppressive extent. This court frequently has said, and it cannot be too often repeated in cases of this character, that the power to tax is the power to destroy; and this constitutes a reason why that power, however moderately exercised in given instances, should be jealously confined to the limits set by the Constitution. Compare *Knowlton* v. *Moore*, 178 U. S. 41, 60. In *Veazie Bank* v. *Fenno*, 8 Wall. 533, a tax of ten per cent. imposed on the notes of state banks was upheld, although it "drove out of existence every State bank of circulation within a year or two after its passage," *Loan Association* v. *Topeka*, 20 Wall. 655, 663-664. In the face of this decision, and others which might be cited, there does not seem to be any sure comfort in the suggestion, sometimes made, that this court may be expected to intervene whenever the tax reaches the point of destruction.

For the foregoing reasons, the judgment below should be affirmed.

Mr. Justice Van Devanter, Mr. Justice McReynolds, and Mr. Justice Butler concur in this opinion.